Supreme Court, U.S.
FILED

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No. _____

In The

# Supreme Court of the United States

EASTERN PILOTS MERGER COMMITTEE,

*Petitioner,*

v.

CONTINENTAL AIRLINES, INC.,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit**

## APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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## APPENDIX A

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United States Court of Appeals,
Third Circuit.

In re CONTINENTAL AIRLINES, INC., Debtor.
Eastern Pilots Merger Committee, Appellant,

v.

Continental Airlines, Inc., Patricia A. Staiano, Trustee.

No. 00-3505.

Argued Dec. 11, 2001.
Filed Jan. 25, 2002.

Carol Connor Flowe (argued), Arent, Fox, Kintner, Plotkin & Kahn, PLLC, Washington, DC, John J. Gibbons, Gibbons, Del Deo, Dolan, Griffinger & Vecchione, PC, Newark, NJ, David L. Shapiro, Cambridge, MA, James F. Harker, Herlihy, Harker & Kavanaugh, Wilmington, DE, Charles M. Tatelbaum, Cummings & Lockwood, Naples, FL, Attorneys for Appellants.

James L. Patton, Jr. (argued), Robert S. Brady, Young, Conaway, Stargatt & Taylor, LLP, Wilmington, DE, Attorneys for Appellees.

Before: BARRY and ALDISERT, Circuit Judges, and FULLAM,* District Judge.

---

* The Honorable John P. Fullam, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

## OPINION OF THE COURT

ALDISERT, Circuit Judge.

Eastern Pilots Merger Committee ("EPMC" or "Appellants") appeals from a judgment of the district court affirming an order entered by the bankruptcy court enforcing a Reorganization Plan in favor of Appellee, Continental Airlines, Inc. This appeal requires us to decide two questions: (1) whether the district court erred in interpreting the decision in *In re Continental Airlines, Inc.*, 125 F.3d 120 (3d Cir.1997) ("*Continental I*"), as encompassing Appellants' post-confirmation rights under a collective bargaining agreement of Eastern Airlines, Inc.; and (2) if this court's decision in *Continental I* is so interpreted, whether that decision should be reconsidered.

Because the facts and procedural history have been set forth in detail in *Continental I*, we discuss here only the bare adjudicative facts underlying our discussion of the legal issues presented.

This dispute centers around an action which took place on February 23, 1986, when Eastern Airlines, Inc. and its pilots' union, the Air Lines Pilot Association ("ALPA"), ratified a collective bargaining agreement ("the Agreement") that included certain Labor Protective Provisions ("LPP's"). Under these LPP's, Eastern's pilots secured protection of their seniority rights in the event of a merger between Eastern and another airline carrier by requiring the integration of Eastern's seniority list with the merging carrier's list. The next day, Texas Air Corporation, parent corporation of Continental, acquired Eastern. Subsequently, Continental initiated a Chapter 11 reorganization proceeding.

ALPA filed protective proofs of claim ("Claims") in Continental's bankruptcy, contending that because "a merger between Eastern and another airline carrier [Continental]" had taken place, its members were entitled to specific performance of seniority rights under the LPP's, together with money damages. Thereafter, Continental's Second Amended Joint Plan of Reorganization was confirmed by the bankruptcy court. The court's confirmation order essentially clarified that any valid claims based on the LPP's would give rise to a right of financial payments that would be dischargeable in bankruptcy. It also provided that Claimants had no right to injunctive, equitable or other relief.

After appealing the bankruptcy court's order to the district court, ALPA settled with Continental, but the LPP Claimants continued their appeal. Unsuccessful in the district court, several groups, including the present Appellants, appealed to this court. We ruled that the bankruptcy court had jurisdiction to decide how the Claims would be treated in bankruptcy, i.e., that "the bankruptcy court was well within its authority to exercise jurisdiction over the issue of the status of the bankruptcy claim[s]." *In re Continental Airlines, Inc.*, 125 F.3d at 131. And critically important, we determined that the Claims could be converted to money damages. *Id.* at 136.

The Supreme Court denied a Petition for a Writ of Certiorari. *LLP Claimants v. Continental Airlines*, 522 U.S. 1114, 118 S.Ct. 1049, 140 L.Ed.2d 113 (1998).

In response to the commencement of a separate lawsuit brought by Appellants in the United States District Court for the District of New Jersey (the "New Jersey Action"), Continental filed a Reorganized Debtors' Motion

for Order Compelling Compliance with Order Confirming Plan of Reorganization and for Sanctions ("the Compliance Motion") in the bankruptcy court seeking to halt the New Jersey Action. The airline sought a determination that the Confirmation Order barred the New Jersey Action because all potential relief relating to the LPP's had been addressed in the bankruptcy proceeding. The bankruptcy court agreed with Continental, stating:

> [S]ince we find that the decision of the Third Circuit affirmed the ruling that all claims of the Eastern Pilots are discharged by the Confirmation Order, we conclude that the Confirmation Order does bar the New Jersey Action instituted by EPMC. Continental is entitled to sanctions against EPMC for its knowing and willful violation of the Confirmation Order.

*In re Continental Airlines, Inc.*, 236 B.R. 318, 332 (Bankr.D.Del.1999).

The bankruptcy court had interpreted *Continental I* to mean that all remedies for breach of the LPP's, whether before or after bankruptcy, had been reduced to claims for payment in the bankruptcy proceeding and had been discharged by the Confirmation Order.

On appeal, the district court held that *Continental I* precluded any post-confirmation relief. According to the court, "although the [Agreement] survived the bankruptcy process, [A]ppellants' demand for specific performance of the seniority integration clause did not." *In re Continental Airlines, Inc.*, No. 99-795, 2000 WL 1425751, at *3 (D.Del. Sept.12, 2000). Furthermore, the district court stated that the bankruptcy process would be "meaningless" if the

teachings of *Continental I* did not require that any claim for prospective relief through specific performance be discharged. *Id.* at *2. Thereafter, EPMC appealed.

I.

Appellants repeatedly emphasize that the members of the EPMC have a post-confirmation right to enforce the LPP's contained in the Agreement because Continental failed to reject the Agreement in accordance with the requirements of 11 U.S.C. § 1113. Building on this major premise, Appellants then argue that because Continental failed to properly reject the Agreement, it was assumed by operation of law. Appellants direct our attention to a number of cases, including *In re Roth American, Inc.*, 975 F.2d 949 (3d Cir.1992), in which we stated:

> The Union contends that since Roth American has not sought to reject the collective bargaining agreement under section 1113, Roth American has "assumed" the collective bargaining agreement by operation of law, and that Roth American thus is bound by all of its terms. We agree with the Union . . .

*Id.* at 957. Appellants then argue that under 11 U.S.C. § 365, if the Agreement is assumed it must be assumed cum onere, and any breach of the Agreement must be cured. Appellants' Brief at 13-14 (citing *National Labor Relations Bd. v. Bildisco & Bildisco*, 465 U.S. 513, 531-532, 104 S.Ct. 1188, 79 L.Ed.2d 482 (1984)). From the foregoing premises they urge us to conclude that because the Agreement "rides through the bankruptcy" as if the bankruptcy had never occurred, the LLP provisions continue to be an unsatisfied obligation on the reorganized debtor as to all seniority rights. *Id.* (citing *Bildisco &*

*Bildisco*, 465 U.S. at 546 n. 12, 104 S.Ct. 1188 (Brennan, J., concurring)).

II.

Distilled to its essence, the argument states that because Continental did not follow the statutory procedures for rejecting an executory contract as set forth in 11 U.S.C. § 1113, somehow Appellants are entitled to the injunctive relief post-confirmation that it sought and was denied during the bankruptcy proceedings. There is a glaring defect in Appellants' argument because its basic assumption is flawed. The reality is that the Agreement has never been rejected. This makes their entire rejection argument irrelevant to the motion to enforce the Reorganization Plan.

In the various proceedings arising out of the Plan, proceedings on all levels of the judicial hierarchy, including this court, no court has proceeded on the basis that the Agreement had been rejected. In the case at bar, which seeks enforcement of the Plan, neither the bankruptcy court nor the district court so suggested. Nor do we do so here. Rights granted by the bankruptcy court, affirmed by the district court and discussed by us in *Continental I*, did not arise out of thin air. They were based on the Agreement. We made that crystal clear when this case was previously before us: "Therefore, we conclude that the right to seniority integration [set forth in the Agreement] gives rise to a 'right of payment' such that the remedy constitutes a 'claim' dischargeable in bankruptcy." *In re Continental Airlines, Inc.*, 125 F.3d at 136.

In *Continental I*, this court, as did the bankruptcy court and the district court, did not reject the Agreement.

We interpreted it. We construed the seniority provisions of the Agreement as a basis of providing a right of payment in lieu of injunctive relief after considering a variety of factors to include feasibility. The rejection-of-the-Agreement issue raised by Appellants is irrelevant here because the legal basis for the relief awarded – arbitration to determine entitlement to, and if so, the amount of damages – was based on an interpretation of the Agreement. What was involved here was a simple categorical deductive syllogism: All claims for seniority relief must be based on the Agreement; Appellants make a claim for seniority relief; therefore, Appellants' claims for seniority relief are based on the Agreement.

III.

We believe the critical question for decision in this appeal to be uncomplicated: Did this court in *Continental I* adjudicate only claims for pre-petition seniority rights or did our holding include also rights arising post-confirmation? The answer is not difficult. When Appellants appeared before us in *Continental I* by written brief and oral argument, and responded specifically to questions put to them by the court, and when they filed their Petition for a Writ of Certiorari to the Supreme Court, their arguments were clear and unequivocal: They demanded complete relief under the Agreement for the past, present and future.[1]

---

[1] For example, in the Eastern Pilots' brief presented to us in *Continental I*, they argued:

> The cases have thus uniformly held that where the creditor is seeking to require the debtor to take some future

(Continued on following page)

---

> action, as opposed to seeking money, the courts have held that the debtor's obligation is not dischargeable . . .
>
> The present case is likewise one in which these Eastern pilots are not attempting to get money from Continental, but are simply seeking to require Continental to take the future action of seniority integration if the arbitrator orders it.

Joint Appendix at 1033.

The Pilots reasserted this argument in their reply brief stating:

> [I]t cannot be argued in the present circumstances that there is any viable claim for such monetary relief . . . What is left is the purely equitable relief of seniority integration.
>
> * * *
>
> And is not a pilot's career spanning a life's work worth at least a company's covenant not to compete? If a company's covenant not to compete cannot be "reduced" to money damages and discharged in bankruptcy, how can any court claim that a pilot's life-long career can be "reduced" to non-existent money damages?

*Id.* at 764-765.

The transcript of oral argument in *Continental I* also indicates that Appellants were seeking post-confirmation as well as pre-petition relief:

> JUDGE MANSMANN: Okay; they get an arbitration award and Continental says, "You're a little bit too late; we have gone through this whole reorganization; there isn't anything here for you. Now what do you do?"
>
> MR. MCGUINN: There is something there for them. There are jobs there for them. They can be put on the Continental seniority list and that's all they are seeking in this case, to get an arbitration for seniority integration under the LPPs that they were promised 11 years ago.
>
> * * *
>
> MR. MCGUINN: I just want to make sure that you are not substituting "money damages" for "seniority integration" because you have to understand, pilots, their whole career is based on seniority. Simply, reinstatement without seniority integration is fairly meaningless. Seniority integration is what is provided for in the LPPs; that's what we bargained for; that's what we want to get after 11 years.

(Continued on following page)

We understood clearly what was before us then, and we adjudicated accordingly:

> The circumstances indicate that seniority integration would not be a feasible remedy and that an alternative remedy of monetary damages would be appropriate. Therefore, we conclude that the right to seniority integration gives rise to a "right of payment" such that the remedy

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* * *

> MR. MCGUINN: I think you are talking about a career, a career of a pilot, where he goes from flight engineer or second officer to first officer to captain, who builds up a retirement, who has the sheer love of flying, and all of this has been denied that pilot because of what is going on in this Bankruptcy Court and what is going on with these judicial pronouncements that are totally contrary to Norris-LaGuardia, totally contrary to 1113, where Congress has repeatedly, since the 1930s, said, "Please, Judiciaries, stay out of labor disputes; let them be resolved in arbitration." *Id.* at 641-644 (emphasis added).

Finally, Appellants' Petition For Certiorari to the Supreme Court reinforces the broad scope of relief they sought:

> Similarly, these Eastern pilots maintain that losing their pilot jobs at Eastern cannot be compensated by mere money damages (even if real money damages were available). For what is involved is work – a life-long career – with all its tangible and intangible benefits, such as the sheer love of flying, travel benefits, a secure retirement, the self-esteem and self-worth derived from a job well done, the emotional fulfillment of career advancement from second officer to first officer and finally, after years of preparation on a mature airline, to a captain position. All of these are basic and essential elements animating and driving the human spirit of a pilot. To claim that they can be "reduced" to non-existent front pay is not only "disingenuous," but an unwarranted insult to all professional airline pilots.

*Id.* at 417.

> constitutes a "claim" dischargeable in bankruptcy.
>
> We take care to note the boundaries of our holding. It is not our purpose to suggest the award the arbitrator should grant, if an award is warranted upon disposition of the LLP dispute. Our holding is limited to how the claims should be treated in bankruptcy. Simply put, *we hold that any claim based on an award of seniority integration arising out of the resolution of the LPP dispute will be treated as a claim in bankruptcy giving rise to a right of payment. As such, the right to seniority integration is satisfiable by the payment of money damages.*

*In re Continental Airlines, Inc.*, 125 F.3d at 136 (emphasis added).

Suffice it to say that when we said "any claim based on an award of seniority integration," we meant precisely what we said. With apologies to Gertrude Stein, "any claim" means any claim. If we intended to limit the Claim to pre-petition activity, we would have said so. And if Appellants desired the Claim to be so limited, they, too, would have said so in their written briefs or at oral argument or in their Petition for a Writ of Certiorari to the Supreme Court. But they did not.

Appellants expressly requested global, open-ended relief on their terms. As Roscoe Pound would have phrased it in his felicitous expression, they wanted "specific redress" in the form of a mandatory injunction, not "substituted redress" in the form of money damages.[2] We hold

---

[2] Roscoe Pound, *The Theory of Judicial Decision*, 36 HARV. L. REV. 641, 647 (1923).

that the proposition now urged upon us by Appellants has been decided and is totally controlled by our decision in *Continental I*. The relief defined in that case is the only remedy available to Appellants.

IV.

The preclusive effects of former adjudication have been discussed and determined in varying and occasionally conflicting terminology over the past hundred years. In early years, these concepts were referred to collectively by most commentators as the doctrine of res judicata. 18 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, Federal Practice and Procedure § 4402, at 6-7 (1981 and 2000 Supp.). As the law developed, a distinction was made between "pure" res judicata and what came to be known as collateral estoppel. In 1979, the Court explained the distinction:

> Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action. 1B J. MOORE'S FEDERAL PRACTICE p 0.405[1], pp. 622-624 (2d ed.1974); e.g. *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 326, 75 S.Ct. 865, 99 L.Ed. 1122; *Commissioner v. Sunnen*, 333 U.S. 591, 597, 68 S.Ct. 715, 92 L.Ed. 898; *Cromwell v. County of Sac*, 94 U.S. 351, 352-353, 24 L.Ed. 195.

*Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 n. 5, 99 S.Ct. 645, 58 L.Ed.2d 552 (1979).

Today, however, the modern nomenclature for these two doctrines is "claim preclusion" and "issue preclusion," respectively:

> Claim preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit. Issue preclusion generally refers to the effect of a prior judgment in foreclosing successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment, whether or not the issue arises on the same or a different claim. *See* restatement (Second) of Judgments §§ 17, 27, pp. 148, 250 (1980); D. Shapiro, Civil Procedure: Preclusion in Civil Actions 32, 46 (2001).

*New Hampshire v. Maine*, 532 U.S. 742, 121 S.Ct. 1808, 1814, 149 L.Ed.2d 968 (2001).

These two doctrines share the "dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co.*, 439 U.S. at 326, 99 S.Ct. 645.

The doctrine of the law of the case is similar in that it limits relitigation of an issue once it has been decided. However, this doctrine is concerned with the extent to which the law applied in decisions at various stages of the same litigation becomes the governing legal precept in later stages. 18 JAMES WM. MOORE ET AL., MOORE'S

FEDERAL PRACTICE p 134.20 (3d ed.1999). The Court has defined the law of the case as a precept that " 'posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.' This rule of practice promotes the finality and efficiency of the judicial process by 'protecting against the agitation of settled issues.'" *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 816, 108 S.Ct. 2166, 100 L.Ed.2d 811 (1988) (citing *Arizona v. California*, 460 U.S. 605, 618, 103 S.Ct. 1382, 75 L.Ed.2d 318 (1983), and citing 1B JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE p 0.404[1], p. 118 (1984)).

Writing in 1967, Professor Allan D. Vestal identified distinct situations in which a ruling or decision has been made in a case and the same legal problem arises a second time in the same case. Two of these situations are when: (1) an appellate court may rule on a matter and then the same legal question may be raised in the trial court after the case has been remanded to that court for further proceedings; and (2) an appellate court may rule on a matter and then the same legal question may be raised in the same appellate court when the case is appealed a second time.[3] The appeal before us fits squarely within the second situation identified by Professor Vestal.

We do not believe that it is necessary to determine which of the foregoing doctrines prevents Appellants from relitigating an issue that was unambiguously identified, properly presented and ably and vigorously argued by extremely able counsel of all parties. We are satisfied that

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[3] Allan D. Vestal, *Law of the Case: Single Suit Preclusion*, 12 UTAH L. REV. 1, 4 (1967).

under any of these precepts, Appellants are bound by our previous decision and are precluded from avoiding its mandate.

Although Appellants argue alternatively that this panel should reconsider the holding of *Continental I*, we lack the power or authority to overrule a decision of a previous panel.[4]

Nor are we inclined to initiate a suggestion for rehearing en banc.

* * *

We have considered all contentions presented by the parties and conclude that no further discussion is necessary.

The judgment of the district court will be affirmed.

---

[4] "It is the tradition of this court that the holding of a panel in a reported opinion is binding on subsequent panels.

Thus, no subsequent panel overrules the holding in a published opinion of a previous panel. Court en banc consideration is required to do so." 3D CIR. I.O.P. 9.1.

**APPENDIX B**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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No. 00-3505

---

IN RE CONTINENTAL AIRLINES, INC.,

Debtor

EASTERN PILOTS MERGER COMMITTEE,

Appellant

v.

CONTINENTAL AIRLINES, INC.

PATRICIA A. STAIANO, Trustee

---

Appeal from the United States District Court
for the District of Delaware
(D.C. No. 99-CV-00795)
District Judge: Honorable Sue L. Robinson

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Argued: December 11, 2001

Before: BARRY and ALDISERT, *Circuit Judges*, and FULLAM[1], *District Judge*.

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[1] The Honorable John P. Fullam, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

## JUDGMENT

This cause came on to be considered on the record from the United States District Court for the District of Delaware and was argued on December 11, 2001.

On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgment of the district court entered September 15, 2000, be and the same is hereby affirmed.

Costs taxed against Appellant.

Attest:

/s/ Marcia M. Waldron
Clerk

Dated: January 25, 2002

Certified as a true copy and issued in lieu of a formal mandate on April 10, 2002

Teste: /s/ Marcia M. Waldron

Clerk, United States Court of Appeals for the Third Circuit

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

| | |
|---|---|
| CONTINENTAL AIRLINES, Debtor. | Bankruptcy Case No. 90-932 |
| EASTERN PILOTS MERGER COMMITTEE, Appellant, v. CONTINENTAL AIRLINES, Appellee. | Adversary No. 99-47<br>Civil Action No. 99-795-SLR |

### MEMORANDUM ORDER

At Wilmington this 12th day of September, 2000, having reviewed the papers submitted in connection with the above referenced appeal from an order of the United States Bankruptcy Court for the District of Delaware dated June 28, 1999 (D.I. 9911); and having heard oral argument on the same;

IT IS ORDERED that the decision of the bankruptcy court is affirmed, for the reasons that follow:

1. This court has jurisdiction over the appeal pursuant to 28 U.S.C. § 158(a)(1). The bankruptcy court's findings of fact are reviewed for clear error, while its conclusions of law are subject to plenary review. *See In re Cohn*, 54 F.3d 1108, 1113 (3d Cir. 1995).

2. The focus of the instant appeal is the proper interpretation of a previous ruling in this case by the United States Court of Appeals for the Third Circuit in *In*

*re Continental Airlines*, 125 F.3d 120 (3d Cir. 1997). The Third Circuit, of course, is the only authoritative interpreter of its decisions. Nevertheless, this court is bound to give meaning to such in the context of the record presented.

3. According to the Third Circuit, the Air Line Pilots Association, Inc. ("ALPA"), collective bargaining agent for Eastern Air Lines' ("Eastern") pilots, filed proofs of claim in bankruptcy court against Continental Airlines Holdings, Inc and Continental Airlines, Inc. ("Continental"). These claims were based on alleged seniority integration rights stemming from a pending labor arbitration dispute and were filed following Continental's acquisition of Eastern and subsequent refusal to bargain over the seniority integration of Eastern's pilots. The bankruptcy court determined that the claims could be satisfied by monetary awards in lieu of specific performance and enjoined scheduled arbitration proceedings to enforce the seniority rights under the collective bargaining agreement. The district court affirmed the bankruptcy court's determination relating to the claims, but vacated the injunction. The Third Circuit ultimately held "that any claim based on an award of seniority integration arising out of the resolution of the [labor arbitration] dispute will be treated as a claim in bankruptcy giving rise to a right of payment. As such, the right to seniority integration is satisfiable by the payment of money damages." *Id.* at 136.

4. The Third Circuit prefaced its holding with the following language: "We take care to note the boundaries of our holding. It is not our purpose to suggest the award the arbitrator should grant, if an award is warranted upon disposition of the [labor arbitration] dispute. Our holding

is limited to how the claims should be treated in bankruptcy." *Id.* In other words, "any equitable remedy recovered against Continental via arbitration of the underlying labor dispute may be satisfied through an award of monetary damages." *Id.* at 124.

5. Rather than pursue their right to arbitrate under the collective bargaining agreement, appellants instead filed suit in the United States District Court for the District of New Jersey. In said suit, appellants sought the following declaratory relief:

> Notwithstanding the continued existence in full force and effect of the Collective Bargaining Agreement, Continental maintains that the sole remedy of the Plaintiffs is to have their proofs of claim liquidated from the Continental bankruptcy estate, thus denying the Plaintiffs their legal rights under the Collective Bargaining Agreement. The Plaintiff, on the other hand, claim a separate, distinct and concurrent remedy of enforcement of the Collective Bargaining Agreement that has survived Continental's bankruptcy plan of reorganization, confirmation and consummation.
>
> If the present controversy is not resolved by a declaration of the rights of the parties, substantial additional time and expense will be expended by the parties and the arbitrator in a lengthy arbitration and subsequent judicial review of the arbitrator's award. A prompt declaration of the parties' rights prior to the arbitration is in the interest of justice.

(D.I. [8/16/00 letter from Harker])

6. Continental filed suit in the bankruptcy court to enjoin the New Jersey litigation, which relief was granted. More specifically, the bankruptcy court concluded "that the decision of the Third Circuit affirmed the ruling that all claims of the Eastern Pilots are discharged by the Confirmation Order . . . . " (D.I. 9911)

7. The Third Circuit, of course, did not specifically hold that the pilots' claims for prospective relief were discharged by the confirmation order. However, the bankruptcy process would be meaningless if the Third Circuit's decision were not interpreted to require such. The pilots, through their bankruptcy proofs of claim, demanded specific performance of their seniority integration rights. Continental, the bankruptcy court, the district court, and the Third Circuit all recognized that specific performance was not feasible in the context of Continental's plan of reorganization. *See, e.g., id.* at 136. The Third Circuit specifically held that the pilots' claims (for specific performance) "will be treated as a claim in bankruptcy giving rise to a right of payment." *Id.* The tension between bankruptcy law and labor law identified by the Third Circuit at the outset was resolved by the Third Circuit's recognizing the arbitration proceeding as the appropriate forum to determine the pilots' substantive rights (i.e., whether they have seniority integration rights), while maintaining the bankruptcy court's jurisdiction to determine the "manner in which the [claims] in bankruptcy would be treated if a right to seniority integration is established." *Id.* at 131 n.8. Indeed, the Third Circuit's

use of prospective phraseology[2] reflects the fact that the pilots have yet to establish their seniority rights through arbitration. Finally, the Third Circuit has rejected appellants' argument that the failure of Continental to comply with 11 U.S.C. § 1113 has revived appellants' right to specific performance under the agreement:

> Despite our conclusion that failure to comply with section 1113 bars an injunction of the arbitration, we reject the Claimants' contention that the substitution of a monetary damage award, in lieu of seniority integration, is not permitted under section 1113 because it alters or modifies the terms of the collective bargaining agreement. The bankruptcy court's determination of the administrative priority and status of the claims was not based on an interpretation of the [agreement]. Nor did it predetermine the appropriate remedy warranted under the [agreement], thus "nullifying" the agreement and infringing on the arbitrator's jurisdiction. Substitution of the equitable remedy in no way amounts to an alteration or termination of the terms of the collective bargaining agreement.

*Id.* at 137 n.15.

9. In sum, although the collective bargaining agreement survived the bankruptcy process, appellants' demand for specific performance of the seniority integration clause

---

[2] For example:

"[T]he right to seniority integration gives rise to a 'right of payment' such that the remedy constitutes a 'claim' dischargeable in bankruptcy." *Id.* at 136 (emphasis added).

"[T]he right to seniority integration is satisfiable by the payment of money damages." *Id.* (emphasis added).

did not. Therefore, the order of the bankruptcy court shall be affirmed.

10. With respect to the imposition of sanctions, the bankruptcy court has broad discretion to enforce its orders, e.g., through the use of sanctions, and its decision to do so in this case is not clearly erroneous.

/s/ Sue L. Robinson
United States
District Judge

## APPENDIX D

236 B.R. 318
162 L.R.R.M. (BNA) 2780, 34 Bankr.Ct.Dec. 728

United States Bankruptcy Court,
D. Delaware.

In re CONTINENTAL AIRLINES, INC., et al., Debtors.

Bankruptcy Nos. 90-932 (MFW) to 90-984 (MFW).

June 28, 1999.

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### OPINION[1]

MARY F. WALRATH, Bankruptcy Judge.

Before the Court are two Motions, both of which require that we apply the decision of the Court of Appeals

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[1] This Opinion constitutes the findings of fact and conclusions of law of the Court pursuant to Federal Rule of Bankruptcy Procedure 7052, which is made applicable to contested matters by Federal Rule of Bankruptcy Procedure 9014.

for the Third Circuit in this case. *In re Continental Airlines*, 125 F.3d 120 (3d Cir.1997). The first is the Motion of a group of Eastern pilots, the Labor Protective Provision Claimants ("the LPP Claimants"), to expunge the claims of certain other Eastern pilots ("the Other Eastern Pilots")[2] for failure to timely exercise their right to arbitration. The second is the Motion of the Debtor to enforce the Confirmation Order (as affirmed by the Third Circuit) which reduced all the Eastern pilots' claims for specific performance of their collective bargaining agreement to claims for monetary damages discharged by the provisions of the Plan.

We heard argument on the Motions on January 14, 1999. The parties submitted post-trial memoranda and an appendix of related documents on February 25, 1999.

## I. JURISDICTION

This Court has jurisdiction over these Motions, which are core proceedings pursuant to 28 U.S.C. § 1334 and § 157(b)(1), (b)(2)(A), (B) and (O).

## II. FACTUAL BACKGROUND[3]

On February 23, 1986, Eastern Airlines ("Eastern") and its pilots' union, the Air Lines Pilot Association ("ALPA"), ratified a collective bargaining agreement. On

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[2] Among the Other Eastern Pilots are 310 pilots represented by the Eastern Pilot Merger Committee ("EPMC"). It is unclear, however, whether EPMC represents all claimants who may be affected by the Motion.

[3] The facts set forth are derived largely from the Third Circuit's Opinion.

February 24, 1986, Texas Air Corporation, the parent of Continental Airlines, Inc. ("Continental") acquired Eastern. ALPA asserted that the acquisition was a merger requiring integration of the Eastern and Continental pilots' seniority lists under the Eastern collective bargaining agreement. When Eastern and Continental refused to bargain with ALPA on the issue, ALPA initiated arbitration.

In March 1989, Eastern filed bankruptcy and asserted that the automatic stay precluded ALPA from proceeding with the arbitration. After protracted litigation, the Court of Appeals for the Second Circuit held that the automatic stay did not preclude arbitration. *In re Ionosphere Clubs, Inc.*, 922 F.2d 984 (2d Cir.1990).

ALPA and Eastern thereafter proceeded with arbitration before Richard R. Kasher (Mr. Kasher, and any successor is referred to herein as "the Arbitrator"). ALPA sought prospective integration of the Eastern and Continental pilots' seniority lists and back pay until the integration was completed.

In the meantime, Continental filed bankruptcy in December 1990. ALPA (and individual Eastern Pilots) filed unliquidated proofs of claim in that proceeding. Continental filed objections and sought a declaration that the claims were general unsecured prepetition dischargeable claims compensable by an award of monetary damages. ALPA disagreed and asserted that the pilots were entitled to specific performance of the collective bargaining agreement, namely, seniority integration. In addition, ALPA asserted that only the Arbitrator had jurisdiction to determine whether a merger had occurred as defined by

the collective bargaining agreement and the appropriate remedy thereunder.

In February 1993, the Bankruptcy Court sustained Continental's objection to the ALPA claim. In April 1993, the Bankruptcy Court confirmed Continental's Second Amended Joint Plan of Reorganization. In the Confirmation Order, the Bankruptcy Court stated that any claims under the collective bargaining agreement gave rise to a right of payment dischargeable in bankruptcy and that no right to injunctive or other equitable relief was available. The Confirmation Order consequently enjoined the arbitration proceedings. ALPA and the LPP Claimants appealed the February and April orders. While the appeals were pending, ALPA settled with Continental. The Settlement Agreement was ultimately accepted by approximately two-thirds of the Eastern pilots who had filed claims in the bankruptcy case.

The LPP Claimants, who had not accepted the settlement, continued the appeals. The District Court affirmed the Bankruptcy Court's Orders in all respects except the injunction of the arbitration proceedings. *In re Continental Airlines, Inc.*, No. 93-163 (D.Del. Nov. 29, 1995). Specifically, the District Court held that the claims of the pilots were dischargeable and that the Plan which so provided was confirmable. *Id.*, slip op. at 27-32. The District Court concluded, however, that the Bankruptcy Court's injunction was invalid because the Bankruptcy Court failed to set forth in sufficient detail the reasons for the injunction. *Id.* at 35-37. The District Court did not remand that issue, however, because it held that section 1113 of the Bankruptcy Code precluded issuance of the injunction. *Id.* at 42.

Cross-appeals were filed by the LPP Claimants[4] and Continental. On August 29, 1997, the Third Circuit issued its decision. The Court affirmed the Bankruptcy Court and District Court decisions holding that the Eastern pilots' equitable claims for seniority integration could be converted into money damages. 125 F.3d at 131-35. Consequently, those claims could be treated, and discharged, in the Continental Plan of Reorganization. *Id.* at 135-36. However, the Court also held that the Bankruptcy Court could not enjoin the arbitration proceedings (since the collective bargaining agreement requiring arbitration had not been rejected). *Id.* at 136-38.

## III. DISCUSSION

### A. Law of the Case

We start our consideration of the Motions by noting that both require us to interpret the decision of the Third Circuit in this very case. In rendering our decision, we are bound by the doctrine of the law of the case to "implement both the letter and the spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces." *Casey v. Planned Parenthood of Southeastern Pennsylvania*, 14 F.3d 848, 857 (3d Cir.1994) (quoting *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 949 (3d Cir.1985)).

> Law of the case rules have developed "to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." Charles A. Wright et al.,

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[4] Subsequently, a splinter group of the LPP Claimants (EPMC) obtained separate counsel and both prosecuted the appeal for the pilots.

> 18 Federal Rules and Practice § 4478 (1981). Of these rules, the most compelling is the mandate rule. This fundamental rule binds every court to honor rulings in the case by superior courts. As the Supreme Court has stated, "In its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306, 68 S.Ct. 1039, 1040, 92 L.Ed. 1403 (1948). The statutory authority for the power of the appellate courts dates from the first Judiciary Act of 1789 and is now found in 28 U.S.C. § 2106.

*Casey*, 14 F.3d at 856 (footnotes omitted).

> The mandate rule applies, however, only to those issues that were decided by the appellate court. *Sanford Fork & Tool*, 160 U.S. at 256, 16 S.Ct. at 293. On remand, a trial court is free to "make any order or direction in further progress of the case, not inconsistent with the decision of the appellate court, as to any question not settled by the decision." *Bankers Trust Co.*, 761 F.2d at 950. "[I]t may consider, as a matter of first impression, those issues not expressly or implicitly disposed of by the appellate decision."

*Id.* at 857.

While the issues before us are not on remand from the Third Circuit, they do require that we implement its ruling.

B. Motion to Strike Claims

The Motion of the LPP Claimants seeks an Order disallowing (for purposes of distribution under Continental's

Confirmed Plan) the claims of the Other Eastern Pilots for failure to timely invoke their right to arbitration[5] Continental supports the Motion to Strike.[6]

1. Jurisdiction

As an initial matter, EPMC asserts that this Court does not have jurisdiction to decide the Motion to Strike. It asserts that the Third Circuit affirmed the District Court determination that the Arbitrator has exclusive jurisdiction to decide whether the individual pilots have any claim. This includes, EPMC asserts, whether those claims are time-barred under applicable labor law.

In response, the LPP Claimants assert that since the Third Circuit held that any claim which the pilots may have under the seniority integration provision was a claim cognizable, and dischargeable, in this bankruptcy case, the Bankruptcy Court has jurisdiction to determine and allow those claims. They also point to the expansive retention of

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[5] The LPP Claimants assert that they alone timely invoked arbitration after the Third Circuit decision. They advise that they have had settlement discussions with Continental but are unable to settle their claims until the Other Eastern Pilots' claims are determined or disallowed.

[6] EPMC initially raised an objection to the standing of the LPP Claimants to press the Motion to Strike, because the Confirmed Plan prohibits any party except Continental from objecting to any claims. (Appendix to Debtor's Memorandum of Law, Tab 1 at § 11.1.) Even in the absence of an express provision in the Confirmed Plan, EPMC asserts that one creditor does not generally have a right to object to the claim of another creditor, unless the trustee or debtor refuses to act. *See, e.g., In re Thompson*, 965 F.2d 1136, 1147 (1st Cir.1992); *In re Morrison*, 69 B.R. 586, 589 (Bankr.E.D.Pa.1987); *In re Charter Co.*, 68 B.R. 225, 227 (Bkrtcy.M.D.Fla.1986). EPMC's standing objection is mooted, however, by the joinder of Continental in the Motion to Strike.

jurisdiction provisions of the Confirmed Plan and Confirmation Order to support their position. (*See* Appendix to Debtor's Memorandum of Law, Tab 1 at Section 15.1, and Tab 3 at p 53.)[7]

The latter argument is without merit. If a court does not have jurisdiction over a dispute, it cannot create that jurisdiction by simply stating it has jurisdiction in a confirmation or other order. *See, e.g., United States Trustee*

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[7] Section 15.1 of the Plan provides:

> 15.1 Retention of Jurisdiction. From and after the Effective Date, the Bankruptcy Court shall retain and have exclusive jurisdiction over the Chapter 11 Case for the following purposes:
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> to determine any and all objections (a) to the allowance of Claims;
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> . . .
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> to determine all controversies, suits (e) and disputes that may arise in connection with the interpretation enforcement or consummation of this Joint Plan or in connection with the obligations of the Debtors, NewCal, and the NewCal Subs under this Joint Plan, . . . And to enter such orders as may be necessary or appropriate to implement any distributions to holders of Allowed General Unsecured Claims.
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> . . .
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> to administer and enforce the (q) injunctions contained in Sections 12.4, 12.19, and 14.3 of this Joint Plan, and any related injunction or decree contained in the Confirmation Order.

Paragraph 35 of the Confirmation Order provides:

> Notwithstanding confirmation of the Plan, this Court retains exclusive jurisdiction over the Debtors' Chapter 11 cases pursuant to and for the purposes of (a) section 105(a) and 1127 of the Bankruptcy code, (b) Section 15.1 of the Plan, and for such other purposes as may be necessary or useful to aid in the confirmation and consummation of the Plan and its implementation.

*v. Gryphon at the Stone Mansion, Inc.*, 216 B.R. 764, 768 (W.D.Pa.1997) ("a retention of jurisdiction provision within a confirmed plan does not grant a bankruptcy court jurisdiction"); *Walnut Associates v. Saidel, et al.*, 164 B.R. 487, 495 (E.D.Pa.1994) ("the bankruptcy court cannot obtain the power to reserve jurisdiction beyond that which is necessary to effectuate the plan of reorganization merely by inserting a provision in the plan or order of confirmation reserving jurisdiction"); *In re BankEast Corp.*, 132 B.R. 665, 667 (Bankr.D.N.H.1991) ("while the court may properly retain jurisdiction over postconfirmation matters . . . it may not expand its jurisdiction merely by asserting it in a reorganization plan").

Similarly, where a court lacks subject matter jurisdiction over a dispute, the parties cannot create it by agreement even in a plan of reorganization. *See, e.g., In re Almarc Corp.*, 94 B.R. 361, 365 (Bankr.E.D.Pa.1988) and cases cited therein. Thus, the fact that Continental's Plan and the Confirmation Order provided for a broad retention of jurisdiction does not decide the issue. We must determine independently whether we retain jurisdiction over the issues presented.

Post-confirmation, a bankruptcy court has limited jurisdiction. Under the express language of section 1142, the court may "direct the debtor and any other necessary party to execute or deliver . . . any instrument required to effect a transfer of property dealt with by a confirmed plan, and to perform any other act, including the satisfaction of any lien, that is necessary for the consummation of the plan." 11 U.S.C. § 1142(b). However, courts routinely find that the bankruptcy courts have no jurisdiction over the affairs of the post-confirmation debtor and its creditors, particularly with respect to claims arising

post-confirmation. *See, e.g., In re Fairfield Communities, Inc.*, 142 F.3d 1093, 1095-96 (8th Cir.1998) (bankruptcy court lacks jurisdiction over post-confirmation claims); *In re Greenley Energy Holdings of Pennsylvania, Inc.*, 110 B.R. 173, 184 (Bankr.E.D.Pa.1990) (bankruptcy court has post-confirmation jurisdiction only over those matters whose resolution is necessary for consummation of the plan); *In re Iberis International, Inc.*, 72 B.R. 624, 626 (Bankr.W.D.Wis.1986) (assumption of executory contract does not confer jurisdiction on the bankruptcy court over post-confirmation breaches of that contract).

EPMC asserts that this Court lacks jurisdiction to hear the Motion to Strike the Other Eastern Pilots' claims because, it asserts, those claims are based on post-confirmation breaches of the collective bargaining agreement, which the Third Circuit held was never rejected (and therefore passed through the bankruptcy case unaffected). The LPP Claimants and the Debtor counter that the claims are based on pre-petition breach of the agreement and, therefore, the Court has jurisdiction to hear the Motion.

With respect to the Bankruptcy Court's jurisdiction to address the issue at hand, the Third Circuit's opinion provides guidance. The Third Circuit expressly rejected the Claimants' assertion that the Bankruptcy Court lacked any jurisdiction over their claims. 125 F.3d at 130-31. With respect to the treatment of those claims under the Plan of Reorganization, for example, the Third Circuit concluded that the issue was a core matter, within the Bankruptcy Court's jurisdiction. *Id. See also* 28 U.S.C. § 157(b)(1). The Third Circuit held specifically that:

> There can be no dispute that the issue as to whether the bankruptcy claim could be satisfied by a monetary award is a "core bankruptcy matter." . . . Further, the issue decided by the bankruptcy court was how the claim would be treated in bankruptcy. Thus, the bankruptcy court was well within its authority to exercise jurisdiction over the issue of the status of the bankruptcy claim. Our conclusion is consistent with principles that govern the disposition of issues when bankruptcy law and labor law intersect. Accordingly, we conclude that the bankruptcy court had jurisdiction to determine whether the Claimants' claims could be satisfied by a monetary award in lieu of specific performance.

125 F.3d at 131 (citations omitted).

However, that conclusion must be reconciled with the Third Circuit's holding, in that same opinion, that the arbitration provision of the collective bargaining agreement was binding on Continental and that the Bankruptcy Court did not have the power to enjoin arbitration of the Eastern pilots' claims thereunder.[8] *Id.* at 136-38.

Upon reviewing the basis of the Motion to Strike, we conclude that the issue raised by the LPP Claimants (and Continental) is one which the Arbitrator must decide. The Motion to Strike is not premised on any provision of the Bankruptcy Code or Rules. For example, the Motion to Strike is not based on a failure of the Other Eastern Pilots to timely file a proof of claim in accordance with the

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[8] The Third Circuit concluded that the arbitration provision of the collective bargaining agreement was still applicable because that agreement had never been rejected under the applicable provisions of the Code. 125 F.3d at 137; *see* 11 U.S.C. § 1113.

Federal Rules of Bankruptcy Procedure. *See, e.g.*, F.R.B.P. 3001-3005. But *see Pioneer Investment Services Co. v. Brunswick Assocs., L.P.*, 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993) (proof of claim filed beyond bar date may be allowed if excusable neglect found).

Nor is the Motion to Strike based on disallowance or reduction of the claims under any provision of the Bankruptcy Code. *See, e.g.*, 11 U.S.C. § 502(b); *In re Main, Inc.*, 207 B.R. 832, 837 (Bankr.E.D.Pa.), aff'd in relevant part, No. 97-3739, 1997 WL 560119 (E.D.Pa. Aug. 26, 1997) (claim of landlord for unpaid rent must be reduced in accordance with section 502(b)(6) even though state court had already determined amount in final judgment). In those circumstances, the Bankruptcy Court clearly has jurisdiction to allow or disallow a claim.

In contrast, the Motion to Strike the Other Eastern Pilots' claims is premised on a principle of labor law: that an action to compel arbitration of labor issues must be filed within six months of the refusal to arbitrate. While normally the Bankruptcy Court can, and will, apply non-bankruptcy federal and state law to the merits of a claim during the claim objection process, in the case of claims subject to arbitration provisions (in law or contract) the Third Circuit has generally favored deferring to arbitration. *See, e.g., Hays & Co. v. Merrill Lynch*, 885 F.2d 1149 (3d Cir.1989). In this case, the Third Circuit has mandated that the merits of these claims be decided by the Arbitrator. 125 F.3d at 130. The Third circuit has, for example, held that the individual pilots' standing to prosecute claims for seniority integration is an issue subject to the exclusive jurisdiction of the arbitrator. *Id.*

We conclude that the issue of whether the claims of the Other Eastern Pilots were timely and properly asserted in the arbitration process is similarly within the exclusive jurisdiction of the Arbitrator. The Motion to Strike those claims on that basis is consequently denied.

C. Motion to Enforce Confirmation Order

By its Motion to Enforce Confirmation Order, Continental seeks a determination that the Confirmation Order bars an action instituted by EPMC in the United States District Court for the District of New Jersey ("the New Jersey Action")[9] seeking a declaratory judgment that Continental is obligated to comply, post-confirmation, with the terms of the collective bargaining agreement, including the integration of the seniority lists.

1. Jurisdiction

EPMC asserts as an initial matter, that this Court lacks jurisdiction to decide the Motion to enjoin the New Jersey action. EPMC asserts that the Third Circuit decision, which affirmed the District Court's holding that the Bankruptcy Court could not enjoin arbitration, precludes this Court from enjoining the New Jersey Action.

The Third Circuit decision did not so state. That Court held that the Bankruptcy Court could not enjoin the arbitration proceeding; it did not hold that the Bankruptcy Court could not enjoin other actions.

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[9] The New Jersey Action is captioned *Doyle Addington et al. v. Continental Airlines, Inc.*, No. 98-4858 (MTB).

However, as noted above, we must determine independently whether we have jurisdiction to decide the Motion. It is axiomatic that a court possesses the inherent authority to enforce its own orders. *See, e.g., Kokkonen v. Guardian Life Ins. Co. of America*, 511 U.S. 375, 379-80, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) (court has ancillary power to vindicate its authority and effectuate its decrees); *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43, 111 S.Ct. 2123, 115 L.Ed.2d 27 (1991) ("Courts of justice are universally acknowledged to be vested, by their very creation, with power to impose . . . submission to their lawful mandates").

In the bankruptcy context, courts have specifically, and consistently, held that the bankruptcy court retains jurisdiction, inter alia, to enforce its confirmation order. *See, e.g., North American Car Corp. v. Peerless Weighing & Vending Machine Corp.*, 143 F.2d 938, 940 (2d Cir.1944) ("We have, therefore, pointed out the existence of such complementary and auxiliary jurisdiction of the court to protect its original confirmation decree, prevent interferences with the execution of the plan, and otherwise aid in its operation"); *Gryphon at The Stone Mansion*, 216 B.R. at 768 ("courts will exercise jurisdiction over post-confirmation disputes if the matter sufficiently affects creditors' recoveries under a plan of reorganization"); *Walnut Associates*, 164 B.R. at 492 (bankruptcy court retains jurisdiction over post-confirmation administration of the estate until the final decree is entered); *Almarc*, 94 B.R. at 364 (bankruptcy court retains jurisdiction "to protect its [confirmation] decree, to prevent interference with the execution of the plan, and to aid otherwise in its operation"). Furthermore, Rule 3020(d) of the Federal Rules of Bankruptcy Procedure states "Notwithstanding

the entry of the order of confirmation, the court may issue any other order necessary to administer the estate."

EPMC asserts, as significant, the fact that the Plan has been substantially consummated.[10] However, we do not view that as a fatal flaw. In the case of *Donaldson v. Bernstein*, 104 F.3d 547, 551 (3d Cir.1997), the Third Circuit held that the bankruptcy court retained jurisdiction to hear an adversary case after the chapter 11 plan had been confirmed and substantially consummated. In fact, in Donaldson, the chapter 11 case had been closed and later reopened, before the adversary proceeding was even filed. *Id.* at 551-52. The Third Circuit held that even the closing and reopening of the case did not divest the bankruptcy court of jurisdiction to hear the adversary proceeding, which was premised on the alleged fraud of the principals of the debtor in causing the debtor to default on the confirmed plan. *Id.* at 551-53.

Consequently, we do not find significant the fact that the Plan may have been substantially consummated in this case. That fact does not divest us of our inherent jurisdiction to enforce the Confirmation Order issued by this Court.

2. Procedural Flaw

EPMC also asserts, as a preliminary matter, that Continental's Motion must be denied because it seeks an injunction without filing an adversary proceeding. It

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[10] Continental had argued, in a motion to dismiss the appeal as moot, that the Plan had already been substantially consummated. 125 F.3d at 127. The District Court held that substantial consummation of the Plan had occurred. *Id.*

points to Rule 7001 of the Federal Rules of Bankruptcy Procedure which requires the commencement of an adversary proceeding (as opposed to proceeding by motion pursuant to Rule 9014) if injunctive relief is sought.

This is correct as a general proposition. *See, e.g., In re Adams*, 106 B.R. 811, 833 (Bankr.D.N.J.1989) (request for injunctive relief by motion is procedurally defective; such relief requires the commencement of an adversary proceeding by filing a complaint); *Matter of Endicott*, 79 B.R. 439, 440 n. 1 (Bankr.W.D.Mo.1987) (a proceeding "to obtain an injunction or other equitable relief" must be commenced as an adversary proceeding); *In re Entz*, 44 B.R. 483, 485 (Bankr.D.Ariz.1984) (court cannot grant injunctive relief on motion of a party; an adversary complaint is required).

However, it is inapplicable to the case at bar. In this case, Continental is not seeking an injunction, it is merely seeking to enforce an injunction already in place – that created by sections 1141 and 524 of the Bankruptcy Code and the express terms of the Confirmation Order.[11] Rule

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[11] Section 1141 of the Bankruptcy Code provides generally that a confirmed plan of reorganization binds the debtor and all creditors affected by its terms. 11 U.S.C. § 1141. More specifically, section 1141 provides that confirmation of a plan of reorganization discharges the debtor from any pre-confirmation debt (the exceptions to this general rule are not implicated by the facts of this case). *Id.* The effect of discharge is to enjoin permanently a creditor from collecting the discharged debt. 11 U.S.C. 524(a). *See also In re Gehri*, No. CC-95-1841-MEVRU, 1996 WL 862565, at (9th Cir. BAP Sept. 30, 1996) ("upon confirmation [of a chapter 11 plan] the automatic stay [of section 362] is replaced by the permanent injunction of [section 524]"); *In re Polysat, Inc.*, 152 B.R. 886, 893-94 (Bankr.E.D.Pa.1993) (effect of discharge under section 1141 is an injunction against collection of the debt as a personal liability of the debtor).

7001(7) requires the commencement of an adversary proceeding "to obtain an injunction or other equitable relief." Thus, we conclude that, on the basis of the plain language of Rule 7001(7), an adversary proceeding is not necessary where the relief sought is the enforcement of an injunction previously obtained, as in the case of enforcement of the discharge injunction.

The case cited by EPMC, *In re Sykes*, 53 B.R. 107 (Bankr.W.D.Va.1985) is inapplicable. In Sykes, the Court denied a motion to reinstate the automatic stay of section 362 (after the plan had been confirmed) to prevent the sale of certain real property owned by the debtor. Apparently, in that case, neither the plan nor the confirmation order contained any provision enjoining the sale. In contrast, in this case the Confirmation Order (and the Plan) contain express language enjoining lawsuits such as the New Jersey Action.[12] (*See* Appendix to Debtor's Memorandum of Law, Tab 1 at § 12.19, Tab 3 at pp. 41-43.) Thus, Sykes is distinguishable.

Consequently, we conclude that the issue is properly before us on the Motion of Continental to enforce the Confirmation Order.

3. Merits

Turning to the merits of the Motion, we are convinced that the relief requested in the Motion is compelled by the Third Circuit's decision. Continental asserts that EPMC is violating the Confirmation Order by filing and prosecuting

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[12] The Third Circuit vacated the injunction language only to the extent that it barred arbitration. 125 F.3d at 137-38.

the New Jersey Action. EPMC responds that its action does not violate the Confirmation Order because its action is premised on its post-confirmation rights under the collective bargaining agreement, not on its pre-confirmation claims under that agreement. (*See* Motion to Strike and/or Opposition to Reorganized Debtors' Motion for Order Compelling Compliance with Order Confirming Plan of Reorganization and for Sanctions at p 4.)

However, the Third Circuit squarely decided this issue when it concluded that "Simply put, we hold that *any claim* based on *an award of seniority integration arising out of the resolution of the LPP dispute will be treated as a claim in bankruptcy giving rise to a right of payment. As such, the right to seniority integration is satisfiable by the payment of money damages.*" 125 F.3d at 136 (emphasis added). Consequently, the Third Circuit concluded that those claims were discharged by the Plan. *Id.*

Even if the language of the Third Circuit were not so explicit, we believe that its decision could not be read as EPMC wishes: that the Court decided only that the pre-confirmation claim for seniority integration could be discharged in the Plan and Confirmation Order, leaving the post-confirmation claims for enforcement under the terms of the collective bargaining agreement. If that were so, the Eastern pilots would not have been contesting confirmation of the Plan as vigorously as they did. They would have let the Plan be confirmed and, the day after confirmation of the Plan, would have demanded seniority integration.

In fact, most of the arguments that EPMC now makes are identical to those that it made at the Confirmation hearing, at the District Court level and before the Third

Circuit on appeal. EPMC specifically articulated the question before the Third Circuit as: "the issue thus is whether the [labor protective provision] rights, which provide for seniority integration only and do not expressly or by implication mention money damages as an alternative to seniority integration, nevertheless ... can be reduced to claims for *front pay*. . . . " (Appendix of Submitted Documents, Tab 9 at 39 (emphasis added). *See also* Appendix of Submitted Documents, Tab 6 at 17-21.) The inclusion of the argument as to front pay clearly implicated post-confirmation claims. That argument was made by EPMC in the Third Circuit three years after confirmation of the Plan. Thus, EPMC clearly understood that post-confirmation claims were being affected by the Confirmation Order which it sought to reverse on appeal.

Further, it is clear that EPMC's arguments were expressly rejected by the Third Circuit. Now that the Third Circuit has decided that issue against EPMC, it seeks to limit that decision to the issue of pre-confirmation claims. In fact, the Third Circuit's decision was as broad as the Eastern pilots feared (and Continental now urges). As framed by the Third Circuit: "[T]he issue we must decide is whether monetary payment is an alternative for the equitable remedy of seniority integration." *Id.* at 133. The Court concluded yes. *Id.*

In its analysis, the Court made it clear that the monetary award was in substitution for prospective seniority integration (that is, post-confirmation) as well as for the failure to integrate the pilot lists in the past (i.e., pre-confirmation). The Court, in reviewing analogous case law, stated that:

> We find support for the proposition that monetary awards are a viable alternative to the equitable remedy of seniority integration in wrongful discharge cases where we have enforced awards of monetary damages in lieu of reinstatement. Much like reinstatement, seniority integration is a "make whole" remedy, the purpose of which is to restore the employee to the economic status quo that would exist but for the employer's conduct. Although we have recognized that reinstatement is the preferred remedy to address cases of wrongful discharge, we have enforced monetary awards as a viable alternative where reinstatement is impractical.

*Id.* at 135 (emphasis added) (citing *Maxfield v. Sinclair International*, 766 F.2d 788 (3d Cir.1985) (front pay is appropriate alternative to reinstatement where animosity makes reinstatement impractical)).[13] *See also*, *Van Waters & Rogers, Inc. v. Int'l Brotherhood of Teamsters*, 913 F.2d 736 (9th Cir.1990) (upholding arbitrator's award of money damages in lieu of seniority integration).

In applying those principles to the instant case, the Third Circuit stated:

> Moreover, we are convinced that the particular circumstances of this case might make the enforcement of the equitable remedy of seniority integration impractical such that an alternative money damage award would be appropriate. The seniority integration sought by the [Claimants]

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[13] The Court distinguished *Squires v. Bonser*, 54 F.3d 168 (3d Cir.1995), where reinstatement was ordered despite animosity of the parties because of First Amendment implications. 125 F.3d at 135 n. 11. The Court found no similar constitutional concerns in this case. *Id.*

> could potentially result in the displacement of many Continental pilots. Such displacement has the potential to create an environment rife with hostility and low employee morale, not to mention a detrimental effect on employer-employee relations. The circumstances indicate that seniority integration would not be a feasible remedy and that an alternative remedy of monetary damages would be appropriate. *Therefore, we conclude that the right to seniority integration gives rise to a "right of payment" such that the remedy constitutes a "claim" dischargeable in bankruptcy.*

*Id.* at 136 (footnote omitted) (emphasis added).

Clearly, the Third Circuit's decision did not contemplate that the Eastern pilots would retain their right to seniority integration after confirmation of the Continental Plan. Rather, the Court concluded that any right to seniority integration (without distinguishing between pre or post-confirmation) gave rise to a claim for money damages which was discharged by the Confirmation Order.

The Third Circuit explained the effect of its ruling:

> We take care to note the boundaries of our holding. It is not our purpose to suggest the award the arbitrator should grant, if an award is warranted upon disposition of the LPP dispute. Our holding is limited to how the claims should be treated in bankruptcy. Simply put, we hold that *any claim* based on *an award of seniority integration arising out of the resolution of the LPP dispute will be treated as a claim in bankruptcy giving rise to a right of payment. As such, the*

> *right to seniority integration is satisfiable by the payment of money damages.*

*Id.* (emphasis added).

Thus, although the Third Circuit upheld the District Court's dissolution of the injunction against arbitration and found that Continental had a duty to arbitrate the Eastern pilots' dispute, it concluded that any claim which the Arbitrator might award was convertible to money damages and dischargeable under Continental's Plan. *Id.* at 136-38. The Court expressly rejected EPMC's current assertion that conversion of the right to seniority integration into a right to monetary damages alone was barred by section 1113. *Id.* at 137 n. 15.

In fact, the Eastern pilots recognized that the impact of the confirmation decision (and the Third Circuit's affirmance) was much more expansive than EPMC now argues. In their Petition for Writ of Certiorari, the LPP Claimants asserted that:

> The Third Circuit's ruling authorizes Continental to ignore the "substantive provisions of the agreement" by removing "the heart of the . . . [labor protective provisions]" which "control seniority" from the collective bargaining agreement. . . . Transforming the jobs protected as a result of the merger through operation of the terms of the collective bargaining agreement into a money damages claim in the bankruptcy effectively destroys the collective bargaining agreement itself as no

> employees covered by the agreement will have the right to a job.

(Appendix of Submitted Documents, Tab 2 at 17-18.[14])

The Petition for Writ of Certiorari filed by EPMC is similar:

> By converting the purely equitable remedy of seniority integration into a meaningless "claim" for money damages, the Court of Appeals has impermissibly intruded into the collectively bargained arbitration process and decreed that any award of an arbitrator granting any type of relief, including seniority integration, is subject to review on the merits by the bankruptcy court. And further, that *any such arbitration award will be totally changed into a money award in an estate without assets*. Labor arbitration was never meant to provide an "empty bucket."

(Appendix of Submitted Documents, Tab 1 at 21 (emphasis added)).[15]

The Supreme Court denied certiorari and the decision of the Third Circuit is law of the case and may not now be reargued.[16] It appears that the New Jersey Action is

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[14] Although designated as Tab 1 in the Appendix of Submitted Documents, the Petition for Writ of Certiorari filed by the LPP Claimants is actually found at Tab 2 in the Appendix.

[15] Although designated as Tab 2 in the Appendix of Submitted Documents, the petition for Writ of Certiorari filed by the Former Eastern Pilots Granted the Right to Substitute Counsel is actually found at Tab 1 in the Appendix. EPMC is the successor to the Former Eastern Pilots Granted the Right to Substitute Counsel.

[16] *See* Part III.A at p. 5, *supra*, for a discussion of the law of the case doctrine.

nothing less than a collateral attack on the Third Circuit decision. EPMC asserts that the New Jersey Action "seeks only a declaration that the arbitrator has authority to determine the appropriate remedy for breach of the collective bargaining agreement postconfirmation." (Supplemental Memorandum of Eastern Pilots Merger Committee at 11.) This is disingenuous, that suit seeks a declaration that the Arbitrator can enter an order for specific performance and that such an order is enforceable notwithstanding the terms of the Confirmation Order. The Third Circuit specifically dealt with both these issues. It held that the arbitration can proceed, but that any order entered by the Arbitrator on the Eastern pilots' claims would be converted to a money judgment and discharged by the terms of the Plan of Reorganization and Confirmation Order. It is the latter decision which the New Jersey Action appears to seek to relitigate and change. This the Eastern pilots may not do.

4. Sanctions

Continental seeks an award of sanctions against EPMC for violation of the Confirmation Order and the discharge injunction contained in sections 1141 and 524 of the Code. We conclude that such an award is merited.

To obtain sanctions for civil contempt, three elements must be established: (1) a valid order of the court must exist; (2) the person to be charged with contempt must have actual knowledge of the order; and (3) the person must have disobeyed the order. *In re Baker*, 195 B.R. 309, 317 (Bankr.D.N.J.1996) (quoting *Roe, et al. v. Operation Rescue*, 54 F.3d 133, 137 (3d Cir.1995)).

As one court has explained:

> The confirmation order and discharge injunction are critical elements of the fresh start that is afforded to debtors in the Bankruptcy Code. It is essential that creditors respect these court orders and permit debtors to benefit from the rights and protections to which they are entitled. Unlike section 362(h), which provides a specific statutory basis for an award of actual damages and attorneys' fees when a creditor violates the automatic stay, there is no remedial provision within the discharge provisions of sections 524 or 1141. Nevertheless, the court may take remedial measures to enforce these provisions and vindicate the rights of a discharged debtor in the event a creditor ignores these essential protections afforded to debtors. *See Matter of Miller*, 81 B.R. 669, 672 (Bankr.M.D.Fla.1988).

Bankruptcy courts have frequently sanctioned creditors for willfully violating the discharge injunction. In some cases, the court has simply found that the debtor is entitled to compensation. *In re Braun*, 141 B.R. 133 (Bankr.N.D. Ohio 1992) (awarding attorneys' fees, compensatory damages and punitive damages for willful violation of § 524). More frequently, courts have found the offending party in contempt. There are two separate grounds for such findings of contempt. Since § 524(a) is an injunction, some courts have applied the longstanding bankruptcy rule that willful violations of injunctions, such as the automatic stay, give rise to contempt and sanctions. *See Behrens v. Woodhaven Ass'n*, 87 B.R. 971, 976 (Bankr.N.D.Ill.1988) (awarding actual damages and attorneys' fees). The more common approach, however, has been to find the

> party in contempt based on the bankruptcy court's authority under 11 U.S.C. § 105. *In re Barbour*, 77 B.R. 530 (Bankr.E.D.N.C.1987) (contempt power authorizes awarding damages and attorneys' fees or willful violation of § 524); *In re Miller*, 81 B.R. 669 (Bankr.M.D.Fla.1988) (attorney who willfully violated permanent injunction found in contempt and held liable for damages incurred by debtor); *Kimco Leasing, Inc. v. Knee*, 144 B.R. 1001 (N.D.Ind.1992).
>
> In order to be found in civil contempt, the offending party must have knowingly and willfully violated a definite and specific court order. *In re Ryan*, 100 B.R. 411, 417 (Bankr.N.D.Ill.1989).

*In re Thomas*, 184 B.R. 237, 240-41 (Bankr.M.D.N.C.1995) (footnotes omitted). Accord, *In re Aspen Limousine Service, Inc.*, 198 B.R. 341, 349-51 (D.Col.1996); *In re Kennedy*, 80 B.R. 673 (Bankr.D.Del.1987) (courts have inherent contempt powers to enforce compliance with their lawful orders). *See* F.R.B.P. 9020.

In this case, there is a valid, final order: the Confirmation Order, which was affirmed by the Third Circuit. That Order barred any action to enforce any claim discharged by the Confirmation Order. (*See* Appendix to Debtor's Memorandum of Law, Tab 3 at p. 12, p. 42.) Section 524 also provides "an injunction against the commencement or continuation of an action, the employment of process, or an act to collect, recover or offset any [discharged] debt as a personal liability of the debtor. . . ." 11 U.S.C. § 524(a)(2). The Third Circuit held that any claim for seniority integration under the collective bargaining agreement was discharged by the Confirmation Order. 125 F.3d at 136. Thus, the first element necessary for an imposition of sanctions is found.

Second, EPMC had actual knowledge of that Order, and its effect. EPMC was a party to the appeal and vigorously, but unsuccessfully, sought to overturn the Confirmation Order. The second element is met.

Third, EPMC has violated the Order by commencing the New Jersey Action which seeks to enforce a claim discharged by the Confirmation Order. In direct contravention of the Confirmation Order and Section 524, EPMC commenced the New Jersey Action to enforce the seniority integration provisions which the Third Circuit expressly held were discharged by the Confirmation Order. In doing so, EPMC has acted with utter contempt toward the orders of this Court, the District Court and the Third Circuit. The third element necessary for a finding of contempt and award of sanctions is met.

Consequently, we conclude that EPMC is in contempt of the Confirmation Order, as affirmed by the Third Circuit. As a sanction, we will direct EPMC to pay the attorneys' fees and costs incurred by Continental in defending the New Jersey Action and in prosecuting the Motion to enforce the Confirmation Order. Counsel for Continental shall file a statement detailing such fees and costs within thirty days of our decision; EPMC may comment on the reasonableness within twenty days thereafter. We will then make an appropriate award.

## IV. CONCLUSION

We conclude that, while this Court has exclusive jurisdiction to allow the claims of the Other Eastern Pilots against Continental, the Third Circuit has mandated that the issues surrounding those claims (who had standing to press the claims, the validity of the claims, and whether

they are time-barred) must first be resolved by the Arbitrator. We, therefore, deny the Motion to Strike the claims of the Other Eastern Pilots.

Further, since we find that the decision of the Third Circuit affirmed the ruling that all claims of the Eastern Pilots are discharged by the Confirmation Order, we conclude that the Confirmation Order does bar the New Jersey Action instituted by EPMC. Continental is entitled to sanctions against EPMC for its knowing and willful violation of the Confirmation Order.

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## APPENDIX E

125 F.3d 120
156 L.R.R.M. (BNA) 2193, 31 Bankr.Ct.Dec. 579,
Bankr. L. Rep. P 77,557

United States Court of Appeals,
Third Circuit.

In re: CONTINENTAL AIRLINES, Debtor.
AIR LINE PILOTS ASSOCIATION,
v.
CONTINENTAL AIRLINES,
LPP Claimants; Effective Date Committee, Claimants,
Honorable John Stonitsch, Trustee.
LPP Claimants, Appellant No. 96-7028*

In re: CONTINENTAL AIRLINES, Debtor.
AIR LINE PILOTS ASSOCIATION,
v.
CONTINENTAL AIRLINES,
LLP Claimants; Effective Date Committee, Claimants,
Honorable John Stonitsch, Trustee.
Continental Airlines, Inc., Appellant No. 96-7038*.
Nos. 96-7028, 96-7038.

Argued March 13, 1997.
Decided Aug. 29, 1997.

Jon A. Geier (Argued), Paul, Hastings, Janofsky & Walker, Washington, DC, Laura D. Jones, Robert S. Brady, Young, Conaway, Stargatt & Taylor, Wilmington, DE, Attorneys for Continental Airlines.

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* Caption amended in accordance with Clerk's Order dated 3/4/96.

Michael J. Isaacs, Agostini, Levitsky & Isaacs, Wilmington, DE, Myles J. Tralins (Argued), Tralins & Associates, Miami, FL, Attorneys for LPP Claimants.

John A. McGuinn (Argued), Schmeltzer, Aptaker & Shepard, Washington, DC, Attorney for Eastern Pilots Merger Committee.

Before: MANSMANN, LEWIS and MICHEL,** Circuit Judges.

LEWIS, Circuit Judge.

## OPINION OF THE COURT

In this appeal and cross-appeal, we are confronted with a tension between bankruptcy law and labor law. The dispute arose when the Air Line Pilots Association, Inc. ("ALPA"), collective bargaining agent for Eastern Air Lines' ("Eastern") pilots, filed proofs of claim in bankruptcy court against Continental Airlines Holdings, Inc. and Continental Airlines, Inc. ("Continental"). These claims were based on alleged seniority integration rights stemming from a pending labor arbitration dispute and were filed following Continental's acquisition of Eastern and subsequent refusal to bargain over the seniority integration of Eastern's pilots.

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** Honorable Paul R. Michel, Circuit Judge for the United States Court of Appeals for the Federal Circuit, sitting by designation.

The bankruptcy court determined that the claims could be satisfied by monetary awards in lieu of specific performance and enjoined scheduled arbitration proceedings to enforce the seniority rights under the collective bargaining agreement. The district court affirmed the bankruptcy court's determination relating to the claims, but vacated the injunction. Two groups of former Eastern pilots, the LPP Claimants and the Group of 31, both of which are no longer represented by ALPA, appealed to this court.[1]

Resolution of this dispute requires us to determine: (1) whether the bankruptcy claims that the LPP Claimants and the Group of 31 seek to enforce constitute "claims" within the meaning of the bankruptcy code and thus are satisfiable, in the alternative, by a monetary award; and (2) whether the arbitration of a labor dispute that may give rise to the right to seniority integration under a collective bargaining agreement can be enjoined, where the debtor has not explicitly rejected the agreement. We conclude that the rights to seniority integration do constitute "claims" within the meaning of the bankruptcy code. Accordingly, we find that the right to seniority integration gives rise to a right of payment and that any equitable remedy recovered against Continental via arbitration of

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[1] "LPP Claimants" refers to a group of former Eastern pilots whose claims in this appeal are based on certain "labor protective provisions" (LPPs) contained in the collective bargaining agreement. The "Group of 31" is a group of former Eastern pilots, who originally were part of the "LPP Claimants" group and who have retained separate counsel for purposes of this appeal. *See* discussion *infra* Part I.D. While both groups' claims were filed in bankruptcy court by ALPA on their behalf, these two groups are no longer represented by ALPA. *See* discussion *infra* note 5.

the underlying labor dispute may be satisfied through an award of monetary damages. We further conclude that the district court properly vacated the injunction barring arbitration of the underlying labor dispute. Thus, we will affirm.

## I.

### A. *The Underlying LPP Dispute*

On February 23, 1986, following intense negotiations, Eastern and its pilots' union, ALPA, ratified a collective bargaining agreement. On February 24, 1986, the Texas Air Corporation ("Texas Air"), parent corporation to Continental, acquired Eastern. Believing that the acquisition constituted a "merger" within the meaning of certain "labor protective provisions" (LPPs) contained in the collective bargaining agreement, ALPA requested a meeting with Texas Air, Eastern, and Continental to discuss the integration of Eastern's and Continental's seniority lists. Under the LPPs, Eastern's pilots secured protection of their seniority rights in the event of a merger between Eastern and another airline carrier through the integration of Eastern's seniority lists with the merging carrier's list. Specifically, the LPP terms provide:

> Section 2(a). The term "merger" as used herein means joint action by the two carriers whereby they unify, consolidate, merge, or pool in whole or in part their separate airline facilities or any of the operations or services previously performed by them through such separate facilities.
>
> * * *
>
> Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provisions

> shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representative of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.
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> * * *
>
> Section 13(a). In the event that any dispute or controversy . . . arises with respect to the protections provided herein, which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator selected from a panel of seven names furnished by the National Mediation Board for consideration and determination.

(Labor Protective Provisions, sections 2(a), 3, and 13(a)).[2]

Despite ALPA's requests, both Eastern and Continental refused to bargain with ALPA about the integration of the seniority lists. Consequently, ALPA requested the National Mediation Board to proffer a list of seven arbitrators from which a neutral arbitrator could be chosen to determine whether an alleged merger occurred between Eastern and Continental that triggered the LPP seniority integration provision (LPP dispute). Eastern, however,

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[2] The LPPs were based on the standard Allegheny-Mohawk LPPs, which were designed to provide "displacement and dismissal allowances to employees adversely affected by [merger] transaction[s], the equitable integration of seniority lists, and binding arbitration of disputes relating to the LPPs." (Decision of the Eastern Air Lines Pilots System Board of Adjustment). *See Air Line Pilots Ass'n, Intern. v. U.S. Dept. of Transp.*, 838 F.2d 563, 565 (D.C.Cir.1988) (citing *Allegheny-Mohawk Merger Case*, 59 C.A.B. 22 (1972)).

filed for bankruptcy in March, 1989, and refused to submit to arbitration pursuant to the bankruptcy code's section 362 automatic stay provision. 11 U.S.C. § 362 (providing that petitions filed pursuant to Chapter 11 operate as a stay of the commencement or continuation of judicial, administrative, or other actions or proceedings against the debtor). In bankruptcy court, ALPA sought relief from the automatic stay to compel Eastern to arbitrate the LPP dispute. The bankruptcy court denied ALPA's petition. After much litigation, however, the Court of Appeals for the Second Circuit held that the section 362 automatic stay provision did not preclude arbitration in this instance. *See In re Ionosphere Clubs, Inc.*, 922 F.2d 984 (2d Cir.1990).

ALPA and Eastern proceeded to arbitration in April, 1991, commencing with a pre-hearing conference before Richard R. Kasher (Kasher Arbitration). In this proceeding, ALPA sought prospective integration of seniority lists, back pay from the effective date of the merger to the date of the arbitration award, and front pay from the date of the arbitration award to the date that the Eastern pilots would complete training and begin flying for Continental. Prior to the pre-hearing conference, Arbitrator Kasher solicited brief statements of position from the parties to the dispute, and from all potential parties. Eastern consistently maintained that the LPP dispute was not properly within the arbitrator's jurisdiction.[3] Continental filed a statement informing Arbitrator Kasher that it had filed a

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[3] Eastern maintained that only the System Board of Adjustment had jurisdiction to determine whether a merger occurred that triggered the LPPs. On the merits, Eastern contended that if the arbitration proceeded, the Arbitrator should conclude that no merger occurred.

Chapter 11 petition for reorganization in December, 1990. Therefore, it maintained that the arbitration pursued by ALPA was stayed under section 362 of the bankruptcy code and could not proceed without the express approval of the bankruptcy court.

In August, 1992, Arbitrator Kasher issued a decision concluding that he had jurisdiction over the LPP dispute, and could render a determination of the appropriate remedies under the circumstances. Kasher, relying on the bankruptcy court's determination in *In re Ionosphere Clubs, Inc.*, 114 B.R. 379 (S.D.N.Y.1990), specifically rejected Continental's suggestion that the arbitration was barred by the automatic stay. Kasher scheduled hearings on the merits of the dispute, to commence in February, 1993.

B. *The Bankruptcy Court Proceedings*

In September, 1991, while the initial Kasher Arbitration decision was pending, ALPA, on behalf of its members, filed proofs of claim against Continental in Delaware Bankruptcy Court. Their claims were based on the asserted right to seniority integration under the LPPs and specified an unliquidated amount as the debt for which Continental was obligated. In response, Continental initiated an adversary proceeding in bankruptcy court against ALPA, seeking injunctive and declaratory relief relating to the proofs of claim. In that action, Continental filed a Partial Objection To Allowance of Claims and a Motion for Partial Summary Judgment on its Partial

Objection.[4] In both motions, Continental contended that the seniority integration that the claimants sought was not feasible because it would be detrimental to Continental's successful reorganization. Thus, Continental sought a declaration that the claims were, at best, "general, dischargeable, pre-petition, unsecured claims," compensable by an award of monetary damages.

ALPA and the LPP Claimants each filed a separate response to Continental's Partial Objection and Motion for Partial Summary Judgment.[5] ALPA contended that, contrary to Continental's argument, the claims pursued were not general, unsecured pre-petition claims that could be converted to a payment of money damages. ALPA also argued that only an arbitrator had jurisdiction to determine the appropriate remedy under the LPPs. The LPP Claimants essentially maintained that an arbitration proceeding was the appropriate forum to determine the issue of whether a merger occurred that triggered the LPPs, and that the proper remedy was integration of Eastern's seniority lists with Continental's lists.

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[4] Prior to the Kasher Arbitration decision, Continental filed an initial motion for partial summary judgment, seeking a preliminary injunction. Continental argued that the arbitration should be enjoined to protect the jurisdiction of the bankruptcy court over the administration of its estate. It also maintained that the automatic stay provision of the bankruptcy code precluded the arbitration from proceeding. Finally, Continental contended that it was not a party to the collective bargaining agreement between Eastern and ALPA and that it could not be bound by the result of any arbitration over the LPPs.

[5] ALPA's representation of the LPP Claimants ceased after the LPP Claimants instituted actions in federal court against ALPA. The actions alleged causes of action for the breach of the duty of fair representation and defamation arising out of the publication and dissemination of a "blacklist" and for alleged violations of the civil provisions of RICO.

In February, 1993, the bankruptcy court judge, in two orders, granted Continental's Partial Objection To Allowance of Claims and its related Motion for Partial Summary Judgment, determining that there was no genuine issue for trial and that Continental was entitled to judgment as a matter of law. *In re Continental Airlines, Inc., et al.*, Nos. 90-932 through 90-984 (Bankr.D.Del. Feb. 11, 1993) (order granting motion for partial objection to allowance of claims); *In re Continental Airlines, Inc., et al.*, No. 91-153 (Bankr.D.Del. Feb. 11, 1993) (order granting motion for partial summary judgment). Addressing the jurisdictional argument asserted by ALPA, the bankruptcy court concluded that the issue of whether any award granted to ALPA would constitute general, unsecured, prepetition claims was a core matter under the bankruptcy code. Thus, it concluded that it had jurisdiction to resolve the matter. *In re Continental Airlines, Inc., et al.*, Nos. 90-932 through 90-984, slip op. at 1-2 (order granting motion for partial objection to allowance of claims); *In re Continental Airlines, Inc., et al.*, No. 91-153, slip op. at 2 (order granting motion for partial summary judgment). The court then determined that the equitable remedy of seniority integration constituted a "claim" within the meaning of § 101(5) of the bankruptcy code. Accordingly, the court concluded that the remedy could be converted to an award of money damages. *In re Continental Airlines, Inc., et al.*, Nos. 90-932 through 90-984, slip op. at 3-4 (order granting motion for partial objection to allowance of claims); *In re Continental Airlines, Inc., et al.*, No. 91-153, slip op. at 3-4 (order granting motion for partial summary judgment). Finally, the court determined that any right of payment asserted by ALPA was, at best, a general, dischargeable, unsecured claim that was entitled to no administrative priority. *In re Continental Airlines, Inc., et al.*, Nos. 90-932

through 90-984, slip op. at 4-5 (order granting motion for partial objection to allowance of claims); *In re Continental Airlines, Inc., et al.*, No. 91-153, slip op. at 5 (order granting motion for partial summary judgment).

In April, 1993, Continental's Second Amended Joint Plan of Reorganization was confirmed by the bankruptcy court. The court's confirmation order incorporated its prior rulings from the two orders issued in February, 1993. Essentially, it clarified that any valid claims based on the LPPs would give rise to a right of payment dischargeable in bankruptcy and that no right to injunctive, equitable or other prospective relief would flow from any valid claim based on an award under the LPPs. *In re Continental Airlines, Inc., et al.*, Nos. 90-932 through 90-984 (Bankr.D.Del. April, 1993) (Findings of Fact, Conclusions of Law and Order Confirming the Debtors' Revised Second Amended Joint Plan of Reorganization). The court also enjoined the arbitration of the LPP dispute. Continental's plan of reorganization was consummated in late April, 1993.

C. *The ALPA / Continental Settlement*

ALPA and the LPP Claimants appealed the bankruptcy court's February and April, 1993 orders to the district court. While the appeals were pending, ALPA and Continental settled the LPP dispute. The Settlement Agreement, ultimately approved by the bankruptcy court, finally resolved all of ALPA's claims including those pursued in Continental's bankruptcy proceeding and those based on the enforcement of the LPPs in the Kasher Arbitration. Under the terms of the agreement, ALPA agreed to withdraw its appeals to the district court. The

Settlement Agreement also provided an option to the "pilots formerly employed by Eastern" who were no longer represented by ALPA, and who had filed proofs of claim in the bankruptcy proceeding, to participate in the settlement. Approximately two-thirds of these pilots did so.

D. *The District Court Proceedings*

Prior to the ALPA/Continental settlement, Continental filed a motion to dismiss ALPA's and the LPP Claimants' appeals. Continental argued that the appeals from the confirmation order were moot because: (1) the plan of reorganization had been substantially consummated; (2) it was not feasible for the plan to be undone; and (3) any alteration to the plan's fundamental terms would be inequitable. After the settlement, Continental filed a second motion to dismiss the appeals as moot, contending that the LPP Claimants had no individual right to maintain their claims based on the LPPs because ALPA, as the exclusive bargaining representative of the Eastern pilots, had full authority to settle the LPP grievance. Thus, Continental argued, the pilots were bound by the settlement agreement.

In a comprehensive memorandum opinion, the district court addressed the issues appealed by ALPA and the LPP Claimants and presented in Continental's motions to dismiss.[6] As to the first motion to dismiss, the court

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[6] Although the ALPA/Continental settlement agreement provided that ALPA would dismiss its appeal to the district court, ALPA failed to do so prior to the district court's disposition. Ultimately, ALPA did withdraw its claims against Continental. ALPA is not a party to this appeal.

concluded, *inter alia*, that ALPA's and the LPP Claimants' appeals relating to the claim for administrative priority was moot. In support of its conclusion, the court emphasized the substantial consummation of the plan. Specifically, the court noted that the investment leading to the consummation of the plan was based on an overall limit on administrative claims and a determination that ALPA and the LPP Claimants were not entitled to equitable relief. *In re Continental Airlines, Inc., et al.*, No. 93-163 (D.Del. Nov. 29, 1995). As to Continental's second motion to dismiss as moot, the court determined that it could not consider the merits of whether the LPP Claimants had standing under the LPPs to pursue seniority integration individually. Specifically, the court concluded that this issue should be determined by the arbitrator. Therefore, the court refused to dismiss their claims based on their alleged lack of standing to assert the contractual right. *Id.* at 22-25. The court also rejected Continental's argument that the LPP Claimants were bound by the ALPA/Continental settlement. *Id.* at 23.

Turning to the merits of the appeals, the court affirmed the orders of the bankruptcy court in all respects, except for the bankruptcy court's injunction of the arbitration proceedings. *Id.* at 26-45. Relating to the injunction, the court concluded that the bankruptcy court's failure to adequately set forth the reasons for the issuance of the injunction and to describe the acts restrained in its order, as mandated by Federal Rule of Civil Procedure 65(d), was fatal to the validity of the injunction. *Id.* at 34-37. Although it vacated the injunction, the district court refused to remand the matter to the bankruptcy court with instructions to strike the injunction. Rather, the court concluded that under section 1113 of the bankruptcy code,

the bankruptcy court could not enjoin the arbitration even if the requirements of Rule 65(d) were met. *Id.* at 37-40.[7]

The LPP Claimants appealed the district court's order. Continental cross-appealed on the issues of the mootness of the claims and the dissolution of the injunction. On appeal, the Group of 31, a group of former Eastern pilots who previously had been represented by counsel for the LPP Claimants, have obtained substitute counsel, and have filed a separate brief. For purposes of brevity, the Group of 31 and the LPP Claimants will be referred to collectively as "the Claimants" where appropriate.

The district court had jurisdiction under 28 U.S.C. § 158(a). We exercise jurisdiction of the appeal and the cross-appeal from the district court's order pursuant to 28 U.S.C. § 158(d).

## II.

Our review of the district court's determination is plenary. *Brown v. Pennsylvania State Employees Credit Union*, 851 F.2d 81, 84 (3d Cir.1988); *see In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 988 (2d Cir.1990). We exercise the same review of the district court's decision as that exercised by the district court. *Brown*, 851 F.2d at 84. The bankruptcy court's findings of fact are reviewable only for clear error. *Id.* Legal determinations are subject to plenary review. *Id.*

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[7] The court reached this issue only after determining that in spite of the invalidity of the injunction under Rule 65(d), the statutory injunction under 11 U.S.C. § 524, referenced by the bankruptcy court in its order, survived. *In re Continental Airlines, Inc., et al.*, No. 93-163, slip op. at 37, (D.Del. Nov. 29, 1995).

Before we reach the merits of the parties' claims, we must address Continental's two challenges to the Claimants' appeals contending that the appeals should be dismissed. First, Continental maintains that the LPP Claimants' notice of appeal is defective for lack of adequate identification of the parties to the appeal under Federal Rule of Appellate Procedure 3(c). Next, Continental argues that the Claimants' lack standing to assert claims for individual seniority integration under the LPPs and that the appeals should be dismissed as moot.

A. *Appellate Jurisdiction*

Continental requests that the LPP Claimants' appeal be dismissed pursuant to Federal Rule of Appellate Procedure 3(c) for failure of their notice of appeal to identify each member of its group participating in this appeal. The notice of appeal filed by the LPP Claimants simply identifies the appellants as "the LPP Claimants." Continental argues that this identification is insufficient, emphasizing that a number of the LPP Claimants participated in the Continental/ALPA settlement and, consequently, waived their claims on appeal. Continental contends that the notice of appeal did not specify those members who did not waive their claims and who are appealing from the district court's order. We reject this argument, and conclude that the LPP Claimants notice of appeal adequately identifies the appellants.

The requirements of Rule 3(c) are jurisdictional. *Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 320-21 (1988). In *Torres*, the Supreme Court explained that permitting a court to exercise jurisdiction over parties not named in a notice of appeal would be equivalent to extend-

ing the time prescribed to file a notice of appeal, a power not granted to the court. *Id.* at 315, 108 S.Ct. at 2407-08. Thus, the failure of a notice of appeal to name a party constitutes a jurisdictional bar to the appeal, and thus a failure of that party to appeal. *Dura Systems, Inc. v. Rothbury Investments, Ltd.*, 886 F.2d 551, 554 (3d Cir.1989).

Generally, rules of procedure should be liberally construed. *Torres*, 487 U.S. at 316, 108 S.Ct. at 2408. In Torres, the Supreme Court emphasized that, "mere technicalities should not stand in the way of consideration of a case on its merits." *Id.* (internal quotations omitted). Thus, in the context of Rule 3(c), jurisdiction may be appropriate if a litigant's actions are functionally equivalent to the requirements of Rule 3(c). *Masquerade Novelty v. Unique Industries*, 912 F.2d 663, 665 (3d Cir.1990). We have applied this construction numerous times to support a finding of jurisdiction in the absence of strict, technical compliance with the requirements of Rule 3(c). *See id.* (where the contents of documents filed within the time prescribed to file a notice of appeal contain the information required by Rule 3(c), the party will be deemed to have complied with the rule and the case will not be dismissed for lack of appellate jurisdiction); *Dura Systems, Inc.*, 886 F.2d at 554-55 (Consent Order filed by the appellants within the time prescribed to file a notice of appeal served as the "functional equivalent" of what Rule 3(c) required such that the technical failure of the actual notice of appeal was not a bar to jurisdiction); *see also In re Bertoli*, 812 F.2d 136 (3d Cir.1987) (litigant's filing of a "Notice of Motion for Certification of An Interlocutory Appeal" in the district court within the thirty-day time period allowed to file a notice of appeal was sufficient to

satisfy Rule 3(c) where the litigant failed to file an actual notice of appeal; the document communicated an intention to appeal and identified the judgment appealed from and the court to which the appeal was taken).

The purpose of Rule 3(c)'s identification requirement is to provide notice to the court and the opposing parties of the identity of the appellants. *Torres*, 487 U.S. at 318, 108 S.Ct. at 2409; *Dura Systems, Inc.*, 886 F.2d at 555. Since ALPA and the LPP Claimants filed their appeals in the district court, the LPP Claimants have been identified as a group of former Eastern pilots, no longer represented by ALPA, seeking to enforce their seniority integration rights under the LPPs. When ALPA settled its claims with Continental, both Continental and ALPA, via the settlement agreement, granted the LPP Claimants the opportunity to participate in the settlement. Continental was well aware of the individuals who elected to exercise this option. The settlement agreement specifically required those pilots electing to participate in the settlement to execute one of two forms indicating an intent to participate in the settlement and to return the form to Continental. Those individuals who opted to settle their claims waived their right to appeal. Thus, the group of LPP Claimants dwindled to an identifiable, discrete entity made up of those individual pilots who chose not to participate in the settlement.

The term "LPP Claimants" has been subject to a common understanding among all parties to this litigation relating to the individuals comprising the group. Accordingly, we conclude that the LPP Claimants' notice of appeal sufficiently identifies the entity such that Continental, as well as this Court, is adequately apprised of the identity of the appellants such that appellate jurisdiction

is proper. In so doing, we follow the Supreme Court's directive to construe Rule 3(c) liberally and to avoid a construction that would permit "mere technicalities" to bar the consideration of this case on the merits. *Masquerade Novelty*, 912 F.2d at 666 (quoting *Dura Systems*, 886 F.2d at 555).

B. *Whether the Claimants' Appeals are Moot*

Continental argues that the Claimants' appeals are moot, relying on ALPA's settlement of its LPP dispute with Continental. Essentially, Continental maintains that the claim settled by ALPA was a "group" claim. Thus, Continental argues, when ALPA settled the dispute, it settled the claim on behalf of the entire group on whose behalf it filed the bankruptcy claims, including the Group of 31 and the LPP Claimants. According to Continental, then the relevant question is whether "if [individual rights to seniority integration arbitration under the LPPs] existed at all, [those] rights survived ALPA's settlement of the group grievance." In the district court, Continental challenged the LPP Claimants' individual standing under the LPPs to prosecute their rights to seniority integration. The district court declined to consider the merits of this argument, explaining that the issue constituted a "minor" dispute under the Railway Labor Act, 45 U.S.C. §§ 151-163, and was subject to the jurisdiction of the arbitrator. We conclude that because the Claimants' individual rights to prosecute their claims for seniority integration have not been established under the LPPs, we need not address whether the Claimants' individual rights to seniority integration survived ALPA's settlement of the dispute.

The right to seniority integration under the LPPs turns on whether a "merger" between Eastern and Continental occurred within the meaning of the LPPs. This determination depends on the meaning, interpretation and proper application of the LPPs. In turn, the issue of standing to maintain an individual claim for seniority integration under the LPPs is a "minor" dispute under the Railway Labor Act, 45 U.S.C. §§ 151-163. *See Consolidated Rail v. Labor Executives*, 491 U.S. 299, 302, 109 S.Ct. 2477, 2480, 105 L.Ed.2d 250 (1989) ("major disputes seek to create contractual rights, minor disputes to enforce them") (quoting *Elgin, J & E. Ry. Co. v. Burley*, 325 U.S. 711, 723, 65 S.Ct. 1282, 1289-90, 89 L.Ed. 1886 (1945) (minor disputes are those relating either to the meaning or proper application of a particular provision with reference to a specific situation)); *Chicago & North Western Transp. Co. v. Local Union 214*, 829 F.2d 1424, 1427 (7th Cir.1987). Accordingly, the issue of standing is subject to the exclusive jurisdiction of the arbitrator, and the district court properly concluded that its role relating to this issue was to protect the jurisdiction of the arbitration board. *Consolidated Rail*, 491 U.S. at 304, 109 S.Ct. at 2481 ("the [National Railroad Adjustment] Board . . . has exclusive jurisdiction over minor disputes. Judicial review of the arbitral decision is limited."); *Chicago & North Western Transp.*, 829 F.2d at 1428.

Consistent with the federal courts' role relating to minor disputes, i.e., to protect the jurisdiction of the arbitration board, federal courts cannot inquire into the merits of an underlying dispute except to the extent necessary to determine its proper characterization as minor or major. *Chicago & North Western Transp.*, 829 F.2d at 1428. Nor may the courts decide what remedy is

appropriate if the agreement is interpreted to require recovery of a remedy. *General Committee of Adj., United Transp. Union v. CSX R.R.*, 893 F.2d 584, 592-93 (3d Cir.1990). Thus, the district court properly concluded that it could not consider the merits of Continental's argument that the Claimants did not have standing under the LPPs. As the Claimants' right to prosecute their claims for seniority integration have not been established under the LPPs, we find that we need not address Continental's argument that their individual rights did not survive ALPA's settlement of the LPP dispute.

C. Merits of the Appeal

1. Bankruptcy Court's Jurisdiction

Before we determine whether the bankruptcy court properly determined the status of the Claimants' claims, we must address the Claimants' contention that the bankruptcy court did not have jurisdiction over the matter. The Claimants maintain that because the LPP dispute arose wholly outside the bankruptcy context, the matter is a "non-core" dispute over which the bankruptcy court did not have jurisdiction. The flaw in the Claimants' argument is that they confuse the disposition of the merits of the underlying LPP dispute with the treatment of their claims in bankruptcy. The bankruptcy court had exclusive jurisdiction over the latter.

A bankruptcy court has jurisdiction over all "core proceedings arising under title 11, or arising in a case under title 11." 28 U.S.C. § 157(b)(1) (1993); *In re Wood*, 825 F.2d 90, 95 (5th Cir.1987). Section 157(b) does not define "core proceedings." However, the phrase has been

interpreted to apply to those rights that are created by federal bankruptcy law:

> If the proceeding involves a right created by the federal bankruptcy law, it is a core proceeding . . . If the proceeding is one that would arise only in bankruptcy, it is also a core proceeding; for example, the filing of a proof of claim or an objection to the discharge of a particular debt.

*In re Wood*, 825 F.2d at 97. *See Beard v. Braunstein*, 914 F.2d 434 (3d Cir.1990) (acknowledging the standard for "core proceedings" articulated in *Wood*).

There can be no dispute that the issue as to whether the bankruptcy claim could be satisfied by a monetary award is a "core bankruptcy matter." By filing a proof of claim against Continental's estate in bankruptcy court, the Claimants "invoke[d] the special rules of bankruptcy concerning objections to the claim, [and] estimation of the claim." *Wood*, 825 F.2d at 97. Further, the issue decided by the bankruptcy court was how the claim would be treated in bankruptcy. Thus, the bankruptcy court was well within its authority to exercise jurisdiction over the issue of the status of the bankruptcy claim. Our conclusion is consistent with principles that govern the disposition of issues when bankruptcy law and labor law intersect. *See L.O. Koven & Brother, Inc. v. Local Union No. 5767*, 381 F.2d 196, 205 (3d Cir.1967) ("Questions involving an interpretation of the Bankruptcy Act should be decided by the court, while questions involving an interpretation of the collective bargaining agreement should if feasible be decided by the arbitrator."); *see also Garland Coal & Mining Co. v. United Mine Workers*, 778 F.2d 1297, 1304 (8th Cir.1985) ("Once the arbitrator has decided the liability issue, the case should be returned to the bankruptcy court to decide

the questions of allowability and priority of claims."). Accordingly, we conclude that the bankruptcy court had jurisdiction to determine whether the Claimants' claims could be satisfied by a monetary award in lieu of specific performance.[8]

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[8] For the same reasons, we reject the Group of 31's efforts to invoke the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, to implicate the bankruptcy court's jurisdiction to determine how the claims will be treated in bankruptcy. Section 1 of the Norris-LaGuardia Act provides:

> No court of the United States as defined in this chapter, shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case involving or growing out of a labor dispute, except in a strict conformity with the provisions of this chapter; nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this chapter. 29 U.S.C. § 101.

The Group of 31 contends that despite the district court's order vacating the injunction, the ruling that the remedy in arbitration can be "reduced" from full seniority integration to a claim for front pay "is as clearly an injunction and interference with the Kasher arbitration as was the bankruptcy court's blanket injunction against the continuation of the arbitration." The conversion of the equitable remedy to front pay, upon successful challenge at the arbitration proceedings, only affects the administration of the claim in bankruptcy. It does not operate to enjoin the arbitrator, nor does it dictate any particular remedy. *Cf. Lukens*, 989 F.2d at 677 (order directing an arbitrator not to preside over any newly ordered arbitration and deeming prior arbitration ineffectual, operated as an injunction). Thus, we will not disturb the bankruptcy court's exercise of jurisdiction over the matter.

Similarly we reject the Claimants' argument that the determination whether the equitable remedy can be converted to a payment of money damages is inconsistent with the district court's conclusion that the individual right to seniority integration under the LPPs involves a "minor" dispute, subject to the exclusive jurisdiction of the arbitrator. *See*

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2. *Whether the Equitable Remedy Constitutes a Claim Under the Bankruptcy Code*

The LPP Claimants' and the Group of 31's primary contention on appeal is that the right to the equitable remedy of seniority integration under the LPPs cannot be converted into a claim for money damages. The Claimants emphasize that they seek specific performance under the LPPs, and they vehemently argue that the payment of money damages is not a viable alternative to the equitable right to seniority integration.

The district court rejected the Claimants' argument, holding that seniority integration under the LPPs gave rise to a "right of payment" within the definition of a "claim" under the bankruptcy code. In support of its conclusion, the district court further determined that money damages are a viable alternative to seniority integration.

The bankruptcy code defines "claim" as

> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to

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discussion, *supra* Part II.B. We discern no inconsistency between the bankruptcy court's exercise of jurisdiction to determine the status of the bankruptcy claim and the district court's characterization of the issue of the Claimants' standing under the LPPs as a "minor" dispute. The bankruptcy court's ruling related only to the manner in which the Claimants' claims in bankruptcy would be treated if a right to seniority integration is established. This ruling, unlike the standing issue, does not turn on an interpretation of the LPPs. Thus, the bankruptcy court's determination of the status of the claims and the district court's refusal to consider the merits of the standing issue was not inconsistent.

> payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5). The term "claim" as defined in the bankruptcy code is construed broadly to permit debtors to meet all of their legal obligations in bankruptcy and to enable holders of claims to participate in the bankruptcy proceedings. *See Ohio v. Kovacs*, 469 U.S. 274, 279 (1985) ("Congress desired a broad definition of claim."); *see, e.g., Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. 552, 558, 110 S.Ct. 2126, 2130-31, 109 L.Ed.2d 588 (1990) (debtors' obligation to pay restitution as a condition of probation which arose out of a criminal conviction for welfare fraud constituted a "debt" within the meaning of the bankruptcy code that gave rise to a "claim" under the code).

Under section 101(5), an equitable remedy can be deemed a "claim" if that remedy "gives rise to a right of payment." We are guided as to what constitutes a "right of payment" under the bankruptcy code by the Supreme Court's analysis in *Ohio v. Kovacs*. In *Kovacs*, the petitioner, the State of Ohio, obtained an injunction ordering the respondent, William Kovacs, to clean up a hazardous waste site. After Kovacs failed to comply with the injunction, the State obtained the appointment of a receiver, who was directed to take possession of all of Kovacs' assets and property and to clean up the waste site. Subsequent to the appointment of the receiver, Kovacs filed for bankruptcy. In response, the State filed a complaint in bankruptcy seeking a declaration that Kovacs' obligation under the injunction was not dischargeable in bankruptcy because it was not a liability on a "claim" under the bankruptcy code.

The Supreme Court held that the obligation imposed by the injunction had been converted to an obligation to pay money that was dischargeable in bankruptcy. *Kovacs*, 469 U.S. at 283, 105 S.Ct. at 709-10. Critical to the Court's conclusion was its determination that the appointment of a receiver had dispossessed Kovacs of the property and therefore, had removed Kovacs' ability to cooperate with the receiver and remove the waste from the site in compliance with the injunction. Specifically, the Court stated:

> The injunction surely obliged Kovacs to clean up the site. But when he failed to do so, rather than prosecute Kovacs under the environmental laws or bring civil or criminal contempt proceedings, the State secured the appointment of a receiver, who was ordered to take possession of all of Kovacs' nonexempt assets . . . and to comply with the injunction. . . . As wise as this course may have been, it dispossessed Kovacs, removed his authority over the site, and divested him of assets that might have been used by him to clean up the property . . . Although Kovacs had been ordered to "cooperate" with the receiver, he was disabled by the receivership from personally taking charge of and carrying out the removal of wastes from the property. What the receiver wanted from Kovacs after bankruptcy was the money to defray cleanup costs . . . Had Kovacs furnished the necessary funds, either before or after bankruptcy, there seems little doubt that the receiver and the State would have been satisfied.

*Id.* at 283, 105 S.Ct. at 709-10. Thus, the Court concluded that under the circumstances, the clean up order had been converted into an obligation to pay money. *Id.* at 283, 105 S.Ct. at 709-10.

In *In re Torwico Electronics, Inc.*, 8 F.3d 146 (3d Cir.1993), we addressed the issue whether a regulatory obligation directing a Chapter 11 debtor to develop a plan to ameliorate an ongoing environmental hazard could be converted into a "claim" in bankruptcy. In that case, Torwico Electronics, a manufacturing business, filed for Chapter 11 bankruptcy and listed the New Jersey Department of Environmental Protection and Energy (the "Department") as a creditor with a disputed and unliquidated claim.

After Torwico filed its petition for bankruptcy, the Department performed an on-site inspection of Torwico's property and found hazardous waste, for which it issued a notice of violation to Torwico. Two months later, the deadline for filing proofs of claim in Torwico's bankruptcy case passed. The Department had failed to file any proof of claim by this deadline.

The Department, seeking to enforce Torwico's obligation under state and federal environmental laws, issued an Administrative Order requiring Torwico to submit a written closure plan for the hazardous site and assessing a monetary penalty for failure to take action under the earlier notice of violation. The Order specifically stated: "All obligations are imposed pursuant to the police powers of the State of New Jersey, intended to protect the public health, safety, welfare, and environment."

In bankruptcy court, both parties sought summary judgment. Torwico maintained that the obligation constituted a "claim" under the bankruptcy code and that the State's failure to file a timely proof of claim was fatal to the State's position that Torwico was responsible for the obligation. The State, however, argued that the claims

involved were regulatory obligations, not bankruptcy claims, and that Torwico was obligated to remedy the violations addressed in the Order pursuant to state and federal law.

Turning our attention to the Supreme Court's analysis in *Kovacs*, we explicitly noted that this case was unlike *Kovacs* in that the State was not demanding that Torwico pay money to it, but rather was requesting it to take action to ameliorate an ongoing hazard. *Torwico Electronics*, 8 F.3d at 150. Next, we shifted our focus to the nature of the obligation imposed by the Order and concluded that it was not an order for breach of an obligation that gave rise to the right of payment. Specifically, we noted:

> The state here found that the seepage pit was a continuing problem that was leaking hazardous material into the surrounding environment. Thus, the state is not asserting a "repackaged claim for damages"; rather there is an ongoing and continuing threat and . . . an obligation on the part of the debtor to "ameliorate ongoing pollution emanating from accumulated wastes" . . . The state has no "right to payment" here. What it has is a right to force the debtor to comply with applicable environmental laws by remedying an existing hazard.

*Id.* (quoting *In re Chateaugay Corp.*, 944 F.2d 997, 1008 (2d Cir.1991)).[9]

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[9] In *Torwico Electronics*, we were persuaded by, and explicitly applied, the approach adopted by the Court of Appeals for the Second Circuit in *In re Chateaugay Corp.*, 944 F.2d 997 (2d Cir.1991). In that case, the court addressed the issue of what constituted a claim in the

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*Kovacs* indicates, and *Torwico Electronics* implies, that a right of payment under the bankruptcy code is, essentially, an obligation to pay money. Thus, the issue we must decide is whether monetary payment is an alternative for the equitable remedy of seniority integration. *See Matter of Udell*, 18 F.3d 403, 407 (7th Cir.1994) ("[an] example of a 'claim' is a right to an equitable remedy that can be satisfied by an 'alternative' right to payment"). The district court answered this question affirmatively, and we agree.

We begin our analysis by noting that here, when ALPA filed its proof of claim in bankruptcy court, it enumerated the claim as one for money damages, in addition to specific performance, arising out of the underlying LPP labor arbitration dispute. Indeed, in its supplemental prehearing statement filed at the arbitration, ALPA specifically noted that it sought "damages in the form of back pay and front pay against . . . Continental . . . in addition to integrated pilot positions." This is not the end of our inquiry, however. Consistent with the analyses in *Kovacs* and *Torwico Electronics*, we are compelled to examine the nature of the remedy sought and to ascertain whether it can give rise to a right of payment. We conclude that it does.

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context of the bankruptcy of an entity that operated hazardous waste sites. There, the court stated:

> Where an order imposes obligations distinct from any obligation to stop or ameliorate ongoing pollution, the order presents a claim if the government could have done the work itself and then sought reimbursement; under such circumstances there is a breach of an obligation that gives rise to a right of payment.

*In re Chateaugay Corp.*, 944 F.2d at 1008.

Unlike the obligation at issue in *Torwico Electronics*, seniority integration is not a remedy tailored to enforce compliance with any federal or state laws or regulations. The source of the remedy is a provision contained in an agreement. By its contractual nature, it is clear that the remedy was not created to enforce compliance with any particular mandate. Rather, by its terms, seniority integration is a discrete remedy, specifically created to protect a group of employees.[10] Thus, the remedy is a vehicle by which to provide a benefit or compensation to individuals who are covered by the explicit terms of the agreement and who, by the agreement's terms, are entitled to enforce the remedy.

Although the collective bargaining agreement is silent as to the remedy following a breach of the agreement, it is reasonable to conclude that a "corollary right to payment of liquidated damages" would flow from a breach giving rise to the equitable remedy under the LPPs. *See Matter of Udell*, 18 F.3d at 408 (holding that a right to an equitable remedy for breach of performance is a claim if the same breach also gives rise to a right of payment with respect to the equitable remedy or if the right to payment is an alternative to the right to an equitable remedy). *See generally Chauffeurs, Teamsters, Etc. v. Terry*, 494 U.S. 558 (1990) (claim based on breach of a collective bargaining agreement is comparable to a breach of contract claim

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[10] The LPPs specifically state:

> Section 1. The fundamental scope and purpose of the conditions hereinafter specified are to provide for compensatory allowances to employees who may be affected by [a] proposed merger. . . .

(Labor Protective Provisions, section 1).

for which a legal award of money damages in the form of back pay is permitted); *Stewart v. KHD Deutz of America Corp.*, 75 F.3d 1522 (11th Cir.1996) (breach of [collective bargaining claim] is most analogous to a claim for breach of contract). The Court of Appeals for the Ninth Circuit's opinion in *Van Waters & Rogers, Inc. v. Int'l Brotherhood of Teamsters*, 913 F.2d 736 (9th Cir.1990), is instructive.

In that case, the court upheld an award of monetary damages for breach of a contract mandating seniority integration. There, Van Waters, a seller and distributor of chemicals, purchased its competitor, McKesson. Pursuant to the acquisition, Van Waters agreed to assume the terms and conditions of a collective bargaining agreement that existed between McKesson and its employees' union, Local 70. Although the collective bargaining agreement contained a seniority integration clause triggered by a purchase or sale of McKesson, Van Waters refused to honor the terms of the clause after the purchase was complete. Accordingly, Local 70 filed a grievance based on Van Waters' failure to integrate the seniority of the former McKesson employees with Van Waters' seniority list.

Arbitration of the dispute was complicated by two additional factors. First, Van Waters maintained a collective bargaining agreement with another union, Local 287. Second, the collective bargaining agreement between Local 70 and McKesson/Van Waters contained a clause precluding the arbitrator from determining any jurisdictional dispute arising between Local 70 and any other union. The effect of the latter factor was that any ruling on a jurisdictional dispute would be outside of the scope of the arbitrator's authority. As seniority integration of Local 70's employees would affect the seniority of Van Waters' employees and create a potential conflict between the two

unions, resolution of the dispute implicated the arbitrator's authority to resolve the dispute.

At the arbitration hearing, the arbitrator granted Local 70's grievance demanding that the seniority of the former McKesson employees be considered as integrated. However, the arbitrator declined to enforce seniority integration to avoid any jurisdictional dispute. Instead, the arbitrator ruled that the employees would receive damages for any wages and other benefits lost due to Van Waters' failure to consider their seniority. In so ruling, the arbitrator noted that the Local 70 agreement contained a provision that permitted the recovery of damages by employees arising out of an employer's failure to require a purchaser to assume the obligations of the collective bargaining agreement. The Ninth Circuit upheld the arbitrator's award, concluding that the arbitrator properly fashioned a monetary award to the former McKesson employees "for the breach of the terms of Local 70's collective bargaining agreement." *Id.* at 742.

*Van Waters* illustrates that a monetary damage award can be enforced as an alternative to, or can arise with respect to, the equitable remedy of seniority integration. The award is not cumulative, nor does it address a separate remedial concern. Rather, it serves as a substitute for the performance of an equitable remedy that cannot otherwise be enforced. *See Van Waters*, 913 F.2d at 741 ("if violated, [the seniority rights provided under the collective bargaining agreement] could be remedied by an award of damages rather than specific performance.").

We find support for the proposition that monetary awards are a viable alternative to the equitable remedy of seniority integration in wrongful discharge cases where we

have enforced awards of monetary damages in lieu of reinstatement. Much like reinstatement, seniority integration is a "make whole" remedy, the purpose of which is to restore the employee to the economic status quo that would exist but for the employer's conduct. *See Franks v. Bowman Transp. Co.*, 424 U.S. 747, 766, 96 S.Ct. 1251, 1265, 47 L.Ed.2d 444 (1976).

Although we have recognized that reinstatement is the preferred remedy to address cases of wrongful discharge, we have enforced monetary awards as a viable alternative where reinstatement is impractical. *See Maxfield v. Sinclair International*, 766 F.2d 788 (3d Cir.1985) (front pay is an appropriate alternative to reinstatement where the relationship between the parties may be so damaged by animosity that reinstatement is impracticable and the remedial purposes of the statute would be frustrated if front pay were not available as an alternative remedy); *Goss v. Exxon Office Systems Co.*, 747 F.2d 885 (3d Cir.1984) (same); *see also Ellis v. Ringgold School District*, 832 F.2d 27 (3d Cir.1987) (reinstatement may be denied when animosity between the parties makes such remedy impracticable). *Cf. Squires v. Bonser*, 54 F.3d 168 (3d Cir.1995) (special circumstances indicating that tensions between the parties exceed those which normally accompany reinstatement or indicating "irreparable" animosity among the parties involved justifies denial of reinstatement).[11] Similar to the conditions that can result

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[11] *Squires* is distinguishable. That case involved an employee who challenged the district court's failure to direct reinstatement to his former position after a jury sustained a First Amendment constitutional challenge to his employer's failure to reappoint him. Reversing the district court's decision not to reinstate the employee, we stated, "[t]he fact that reinstatement might have disturbing consequences,

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from the enforcement of reinstatement, disruption to the work environment, irreparable damage to work relationships, and hostility and animosity are all very probable conditions that can result from the enforcement of seniority integration. Considering the similarity in purpose between the two remedies, the rationale underlying the enforcement of an alternative remedy to fulfill their remedial purposes, and the similarity in the impracticality of enforcing the remedies under particular circumstances, we are certain that a money damage award is an appropriate alternative to seniority integration.

Moreover, we are convinced that the particular circumstances of this case might make the enforcement of the equitable remedy of seniority integration impractical such that an alternative money damage award would be appropriate. The seniority integration sought by the LPP Claimants and the Group of 31 could potentially result in the displacement of many Continental pilots. Such displacement has the potential to create an environment rife with hostility and low employee morale, not to mention a

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revive old antagonisms, or breed difficult working conditions usually is not enough to outweigh the important first amendment policies that reinstatement serves [absent] probable adverse consequences [that] weigh so heavily that they counsel the court against imposing this preferred remedy." *Squires*, 54 F.3d at 175 (quoting *Banks v. Burkich*, 788 F.2d 1161, 1165 (6th Cir.1986)). Thus, it is clear that our decision to remand with instructions to reinstate the appellant was driven by the constitutional nature of the claims and the compelling need to enforce reinstatement to remedy the violation. As the claims here do not involve constitutional concerns, we cannot conclude that any remedy short of seniority integration will not suffice to remedy the alleged violation.

detrimental effect on employer-employee relations.[12] The circumstances indicate that seniority integration would not be a feasible remedy and that an alternative remedy of monetary damages would be appropriate. Therefore, we conclude that the right to seniority integration gives rise to a "right of payment" such that the remedy constitutes a "claim" dischargeable in bankruptcy.

We take care to note the boundaries of our holding. It is not our purpose to suggest the award the arbitrator should grant, if an award is warranted upon disposition of the LPP dispute. Our holding is limited to how the claims should be treated in bankruptcy. Simply put, we hold that any claim based on an award of seniority integration arising out of the resolution of the LPP dispute will be treated as a claim in bankruptcy giving rise to a right of payment. As such, the right to seniority integration is satisfiable by the payment of money damages.

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[12] We note that nothing about the imposition of monetary damages as a substitute for seniority integration frustrates the remedial purpose of the LPPs. *Cf. Franks*, 424 U.S. at 771, 96 S.Ct. at 1267 (in a Title VII case, "the denial of seniority relief to victims of illegal racial discrimination in hiring is permissible 'only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.' "). Indeed, the LPPs set forth as its scope and purpose "to provide for compensatory allowances to employees who may be affected by the proposed merger of" the carriers. *See* discussion *supra* note 2. An award of monetary damages is consistent with the articulated scope and purpose, and is therefore appropriate.

D. *Arguments of Appellee / Cross-Appellant Continental*

1. *Dissolution of the Injunction*

Continental challenges the district court's ruling vacating the injunction against the continuation of the Kasher Arbitration on two grounds. First, it argues that contrary to the district court's conclusion, the permanent injunction, imposed by the Plan of Confirmation, complied with the mandate of Rule 65(d).[13] Next, it contends that if the permanent injunction did not comply with Rule 65(d), the statutory injunction referenced in the bankruptcy court's confirmation order survived the permanent injunction and is valid. We need not decide whether the permanent injunction failed to comply with the mandate of Rule

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[13] Section 12.19 of the plan of reorganization provided:

> 12.19 *Injunction Relating to Eastern Claims.* This Joint Plan permanently enjoins, and the Confirmation Order shall constitute and provide for a permanent injunction against, any Person or entity, including without limitation, (i) any present or former employee of Eastern . . . (ii) any labor union or collective bargaining representative acting or purporting to act on behalf of any such employees or former employees . . . from commencing, conducting or continuing any suit, arbitration, action or other proceeding in any place or forum against any Debtor, . . . This injunction shall apply, without limitation, to any suit, arbitration, action or proceeding.
>
> (Debtors' Revised Second Amended Joint Plan of Reorganization, § 12.19).
>
> Federal Rule of Civil Procedure 65(d) states: Every order granting an injunction and every restraining order shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained. . . .
>
> Fed.R.Civ.P. 65(d).

65(d). We conclude that even assuming that the statutory injunction survived the permanent injunction and is not subject to the requirements set forth in Rule 65(d), Continental's failure to reject the collective bargaining agreement consistent with the mandate of section 1113 of the Code renders the injunction invalid.

The Confirmation Order issued by the bankruptcy court specifically incorporated the statutory injunction prescribed by the bankruptcy code. The order states:

> In accordance with section 524 of the Bankruptcy Code . . . this Order:
>
> (ii) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt or Claim as a personal liability of the Debtors. . . .

(Findings of Fact, Conclusions of Law and Order Confirming The Debtors' Revised Second Amended Joint Plan of Reorganization).

Assuming, as the district court did and as Continental argues, that the section 524 statutory injunction is not subject to the requirements of Rule 65(d), we conclude that the district court properly vacated the injunction against the Kasher Arbitration. Section 1113 of the Code provides:

> (a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter . . . may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

11 U.S.C. § 1113(a). The provision outlines the procedure that a debtor or appointed trustee must follow to successfully reject a collective bargaining agreement, including, but not limited to: (1) the submission of a proposal to an authorized representative of the employees affected by the terms of the agreement prior to the filing of an application to reject the agreement, 11 U.S.C. § 1113(b)(1)(A); and (2) good faith attempts to reach a "mutually satisfactory modification" of the agreement, 11 U.S.C. § 524(b)(2).

The intent behind section 1113 is to preclude debtors or trustees in bankruptcy from unilaterally terminating, altering, or modifying the terms of a collective bargaining agreement without following its strict mandate. *In re Ionosphere*, 922 F.2d at 989-90. Moreover, the provision operates to preclude the application of other bankruptcy code provisions to the advantage of debtors and trustees to permit them to escape the terms of a collective bargaining agreement without complying with the requirements of section 1113. *See id.*

Continental does not dispute that it did not follow the requirements set forth in section 1113 to reject the collective bargaining agreement. Instead, Continental suggests that the imposition of the injunction was consistent with the bankruptcy court's authority to determine the administrative priority and status of the bankruptcy claims. Thus, it argues, section 1113 cannot divest the bankruptcy court of jurisdiction to exercise this authority and impose the injunction. We disagree.[14]

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[14] We have not been required previously to address the applicability of arbitration under collective bargaining agreements when the employer is in bankruptcy, although the issue was raised in a case we

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The injunction allowed Continental to avoid its obligation to arbitrate the merger dispute under the LPPs. In *In re Ionosphere*, the Court specifically held that the application of the section 362 automatic stay provision to effectuate this result in the absence of the debtor's compliance with the requirements of section 1113 was impermissible, as "its application would allow a debtor unilaterally to avoid its obligation to arbitrate." *In re Ionosphere*, 922 F.2d at 993. Here, the enforcement of the statutory injunction in the face of Continental's failure to follow the requirements of section 1113 is no different. As the enforcement of the injunction would have the effect of permitting Continental to escape its duty to arbitrate under the collective bargaining agreement, we decline to enforce the statutory injunction in the absence of Continental's compliance with the requirements to reject the collective bargaining agreement.[15]

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decided last year. *See Antol v. Esposto*, 100 F.3d 1111, 1121 n. 4 (3d Cir.1996) ("[W]e need not decide that interesting issue here."). This case, however, requires us to do so.

[15] Despite our conclusion that failure to comply with section 1113 bars an injunction of the arbitration, we reject the Claimants' contention that the substitution of a monetary damage award, in lieu of seniority integration, is not permitted under section 1113 because it alters or modifies the terms of the collective bargaining agreement. The bankruptcy court's determination of the administrative priority and status of the claims was not based on an interpretation of the LPPs. Nor did it predetermine the appropriate remedy warranted under the LPPs, thus "nullifying" the agreement and infringing on the arbitrator's jurisdiction. Substitution of the equitable remedy in no way amounts to an alteration or termination of the terms of the collective bargaining agreement.

2. *Duty to Arbitrate*

Finally, we reject Continental's argument that it has no duty to arbitrate the LPP dispute. Throughout this litigation, Continental has premised its arguments on the assumption that it is bound by the LPPs and has a duty to arbitrate the LPP dispute. In so doing, Continental reaped enormous benefits: (1) it was able to obtain a ruling that the claim based on seniority integration could be treated as a right to payment in bankruptcy, satisfiable by a monetary award; and (2) in turn, it received backing from investors for its plan of reorganization, which was critical to plan confirmation by the bankruptcy court.[16] Now, Continental maintains that there has been no determination that it is bound by the LPPs and that the case should be remanded to the district court for a determination on the merits of its duty to arbitrate the dispute.

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[16] It is apparent that Continental assumed this position in efforts to obtain judicial confirmation of its plan of reorganization. In its Motion for Partial Summary Judgment, Continental stated:

> 1. [Debtors] make this Motion For Partial Summary Judgment On Their Partial Objection to Claims Based On Certain Alleged Labor Protective Provisions Involving The Air Line Pilots Association, International ("ALPA") And Eastern Air Lines, Inc. ("Eastern") in order to ensure that they will be able to reorganize successfully and, more specifically, to satisfy a condition of the Investment Agreement dated November 9, 1992 ("Investment Agreement"), by and among [the investors] and the Debtors. In addition to monetary damages, these claims seek to require Continental to hire several thousand Eastern Air Lines pilots, which if granted would necessitate the displacement of an equal number of incumbent Continental pilots. Debtors seek in this Motion a legal determination that the "LPP Claims" . . . are, at best, dischargeable, prepetition general unsecured claims within the meaning of the Bankruptcy Code Section 101(5).

In light of the overwhelming advantage that Continental derived from maintaining the position that it was bound by the collective bargaining agreement, and thus, had a duty to arbitrate the LPP dispute, we refuse to allow Continental to repudiate that representation and return to the district court to litigate the issue whether it is bound by the agreement. *See EF Operating Corp. v. American Bldgs.*, 993 F.2d 1046, 1050 (3d Cir.1993) ("one cannot casually cast aside representations, oral or written, in the course of litigation simply because it is convenient to do so . . . a reviewing court may properly consider the representations made in the appellate brief to be binding as a form of judicial estoppel, and decline to address a new legal argument based on a later repudiation of those representations."). Accordingly, we conclude that Continental is bound by its prior representations that it has a duty to arbitrate the LPP dispute.

## III.

For the foregoing reasons, we affirm the district court's decision in all respects.

## APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

| | | |
|---|---|---|
| In re: | ) | Bankruptcy Court |
| CONTINENTAL AIRLINES, INC. et al., | ) | Case Nos. 90-932 through 90-984 |
| Debtors, | ) | |
| AIRLINE PILOTS ASSOCIATION, INTERNATIONAL, and LPP CLAIMANTS, | ) | C.A. No.: 93-163, 93-164, 93-177, 93-178, 93-250, 93-255, 94-496 |
| Appellants, | ) | Consol. 93-163 LON |
| v. | ) | |
| CONTINENTAL AIRLINES, INC. et al., | ) | |
| Appellees. | ) | |

Stephen W. Spence, Esquire, Phillips, Goldman & Spence, Wilmington, Delaware, Attorney for Claimant-Appellant Air Line Pilots Association; Michael J. Isaacs, Esquire, Agostini, Levitsky & Isaacs, Attorney for Claimant-Appellant LPP Claimants.

Laura D. Jones, Esquire, Young, Conaway, Stargatt & Taylor, Wilmington, DE; Attorneys for Debtors-Appellees.

## MEMORANDUM OPINION

November 29, 1995
Wilmington, Delaware

/s/ Joseph J. Longobardi
LONGOBARDI, District Judge

### I. FACTUAL BACKGROUND

This bankruptcy appeal involves claims against the debtor, Continental Airlines, Inc. ("Continental"), by two parties: the Air Line Pilots Association, International ("ALPA") and a group of approximately six hundred former Eastern Airline Pilots ("LPP Claimants"). The claims arise out of labor protective provisions ("LPPS") included in a collective bargaining agreement executed by Eastern Air Lines, Inc. ("Eastern") and ALPA.

The collective bargaining agreement was signed at 2:45 a.m. on February 24, 1986. *Eastern Air Lines v. Airline Pilots Ass'n Int'l*, 670 F.Supp. 947, 949 (S.D. Fla. 1987), *aff'd* 861 F.2d 1546 (11th Cir. 1988). The collective bargaining agreement simply provided, "LPP's & Takeover Similar to TWA – need to work out between EAL/ALPA legal counsel." In an arbitration decision dated September 22, 1989, a panel of the Eastern-ALPA System Board of Adjustment chaired by Professor Frank Elkouri interpreted that language to encompass sections 2(a), 3, and 13 of the standard "Allegheny-Mohawk LPP's."[1]

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[1] At one time, the Civil Aeronautics Board ("CAB") required merging airlines to adopt these form LPPs as a condition of approving a

(Continued on following page)

In accordance with those LPPs, if Eastern and another carrier were to "unify, consolidate, merge, or pool in whole or in part their separate airline facilities or any of the operations or services previously performed by them" in a manner affecting the seniority rights of the Eastern pilots, "provisions shall be made for the integration of seniority lists in a fair and equitable manner." Provisions for seniority integration were to have been made through collective bargaining, but if collective bargaining failed to yield results, then the dispute was to be referred to an arbitrator selected from a panel of seven arbitrators furnished by the National Mediation Board. The LPPs further provided that the expenses of the arbitrator were to be shared equally by the carrier and either (1) the organization representing the employees or (2) if unrepresented, the employee or group of employees.

Shortly after the collective bargaining agreement between Eastern and ALPA was signed, Texas Air Corporation ("Texas Air")[2] acquired Eastern. *Eastern Air Lines v. Airline Pilots Ass'n Int'l*, 861 F.2d at 1548. Texas Air was Continental's corporate parent company. ALPA and the LPP Claimants allege that after Texas Air acquired Eastern, Eastern and Continental merged or combined in a way that triggered the LPPs. Continental asserts that all of the events constituting an alleged merger occurred before Continental filed for bankruptcy on December 3, 1990, while ALPA contends that the

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merger. Since deregulation, the Department of Transportation generally leaves the issue of LPPs to collective bargaining.

[2] Since June 6, 1990, Texas Air has been known as Continental Airlines Holdings, Inc.

merger continued after the bankruptcy filing. (D.I. 9 at 12). ALPA relies on events which occurred on February 14, 1991, to show that the merger of Eastern and Continental continued after December 3, 1990. The bankruptcy court, however, dismissed these factual allegations, first offered at oral argument, stating "Defendants have not, as required by Fed.R.Civ.P. 56(e), set forth specific facts by affidavits or as otherwise provided by the Rule showing that there is a genuine issue for trial."

Despite the requests of ALPA, Eastern and Continental refused to bargain over the integration of seniority lists. ALPA then attempted to arbitrate the LPP dispute with the National Mediation Board. On March 9, 1989, however, Eastern had filed a petition for reorganization under Chapter 11 of the Bankruptcy Code. Eastern cited the Bankruptcy Code's automatic stay of litigation and refused to participate in the arbitration. The United States Court of Appeals for the Second Circuit held that Eastern must submit to arbitration because "[a]pplication of the automatic stay to ALPA's attempt to invoke [the arbitration] provision of the collective bargaining agreement would allow Eastern unilaterally to alter the collective bargaining agreement by avoiding its obligation to arbitrate." *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 992-93 (2d Cir. 1990), *cert. denied*, 502 U.S. 808 (1991).

Continental filed a petition for Chapter 11 bankruptcy in Delaware on December 3, 1990. Subsequently, ALPA initiated an arbitration against Eastern regarding the LPP dispute before Richard R. Kasher ("Kasher Arbitration"). ALPA claimed to be entitled to three types of damages for the alleged breach of the LPPs. (D.I. 9 at

9). ALPA sought (1) the prospective integration of seniority lists; (2) back pay from the effective date of the merger to the date of the arbitration award; and (3) front pay from the issuance of the arbitration award to the date that the Eastern pilots would complete training and begin revenue flying for Continental. The only money that may still be available to satisfy the claims for monetary relief is a reserve of unallocated stock. (*See* D.I. 15, Exhibit I, pp. 25-26). ALPA claims that equitable relief remains viable because Continental is once again a healthy, operating airline capable of integrating seniority lists if so ordered by an arbitrator.

On April 8, 1991, Arbitrator Kasher held a prehearing conference. He invited Continental, Texas Air, and others to file brief statements of position prior to that conference. Continental filed a statement arguing that the Bankruptcy Act automatically stayed all legal proceedings,, including the Kasher Arbitration, as of December 3, 1990. Thus, argued Continental, the Kasher arbitration could not proceed without the express permission of U.S. Bankruptcy Judge Helen S. Balick. (Kasher Arbitration ("KA"), op. at 20). Eastern argued that the determination of whether the LPPs had been triggered should be made by the System Board of Adjustment rather than by Arbitrator Kasher, a Section 13 LPP Arbitrator.[3] (KA at 4).

Arbitrator Kasher decided that he had jurisdiction to ascertain whether Eastern and Continental had "merged", and if they had, to determine the appropriate

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[3] "Section 13 LPP Arbitrator" refers to an arbitrator appointed pursuant to section 13 of the Allegehny-Mohawk, LPPs.

remedies. (KA at 17, 20-21). He found that ALPA's claim did not "meet the standard indicia of a 'grievance'" which would have been submitted to the System Board of Adjustment. (KA at 20). Arbitrator Kasher found that ALPA "does not appear to have alleged, before this Arbitrator, that Eastern violated a specific term or condition in the collective bargaining agreement. . . . " (KA at 20). Therefore, in accordance with Section 13 of the LPPs, Arbitrator Kasher asserted his jurisdiction to hear the LPP claims.

On April 16, 1993, Judge Balick entered an Order confirming Continental's Joint Second Plan of Reorganization, as Modified ("Plan of Reorganization"). The Plan of Reorganization took effect on April 27, 1993. In the Plan of Reorganization, the bankruptcy court permanently enjoined any arbitration involving the LPPs, including the Kasher Arbitration.

An important piece of the Plan of Reorganization was the investment of $450 million dollars into Continental. One of the conditions of that investment was a judicial determination that ALPA and the LPP claimants were not entitled to prospective relief for any breach of the LPPs. Another condition of the investment was an overall limit on administrative claims. (D.I. 15, Exhibit C). When the bankruptcy court confirmed Continental's Plan of Reorganization, it noted that the $450 million investment was "crucial to the feasibility of the [Reorganization] Plan." (D.I. 15, exhibit I).

In confirming the Plan of Reorganization, the bankruptcy court relied on orders it had entered on February 11, 1993, in which the court had found that

the LPP claims were, at most, general unsecured prepetition claims which could be fully satisfied without the granting of equitable relief.[4] Neither ALPA nor the LPP Claimants moved to stay the confirmation order. While others did move for a stay, Judge Balick denied those motions. On April 27, 1993, the Plan of Reorganization was substantially consummated with the investment by Air Canada and Air partners of $450 million, the consensual restructuring of approximately $1.7 billion of secured debt and $5.4 billion of lease obligations, and the commitment of four classes of unsecured creditors to exchange approximately $3 billion in general unsecured claims for stock in a reorganized Continental.

On March 24, 1994, ALPA and Continental settled nearly all litigation, grievances, arbitration, and bankruptcy claims that had previously been brought by ALPA ("Settlement Agreement"). The Settlement Agreement was approved by the bankruptcy court on July 19, 1994. As part of that Settlement Agreement, ALPA agreed to withdraw its appeals with prejudice.[5] The Settlement Agreement specifically states, however, that ALPA's waiver of its LPP claims has no effect upon "any claims or rights of any pilot who has filed a claim for such in the Delaware Bankruptcy Proceedings and does not participate in this Settlement Agreement." (D.I. 50, item 3, ¶ 8(B)). The LPP Claimants did file claims in

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[4] Continental and ALPA had stipulated that "in making its findings concerning feasibility . . . the Bankruptcy Court may rely and base its findings upon its Order, dated February 11, 1993, regarding ALPA's LPP claims.

[5] ALPA has not yet withdrawn its appeals.

the Delaware bankruptcy proceedings and did not participate in the Settlement Agreement.

## II. PROCEDURAL POSTURE

### A. Orders

ALPA and the LPP Claimants appeal from four orders issued by the bankruptcy court. The first two orders, issued on February 11, 1993, granted partial summary judgment in favor of Continental. The first Order held that (1) ALPA's LPP claims constitute "claims" within the meaning of the Bankruptcy Code because they "can be satisfied by money damages in the form of back pay and/or front pay;" (2) "the LPP claims are, at best, general unsecured prepetition claims and are dischargeable" because the transactions relied upon by ALPA to prove the merger of Continental and Eastern occurred prior to December 3, 1990; and (3) the LPP claims are not entitled to administrative priority. ALPA and the LPP Claimants appeal from this Order. (Civ. A. 93-177 and 93-178). The second Order of February 11, 1993, restated many of the conclusions of the first Order and provided that the first Order was binding upon the LPP claimants, in addition to ALPA. ALPA and the LPP Claimants appeal this second Order. (Civ. A. 93-163 and 93-164).

The following issues are presented by the appeals of the February 11, 1993, Orders:

(1) Whether the Bankruptcy Court has the power to determine the appropriate remedy for Continental's breach of the Labor Protective Provisions?

(2) Whether the Bankruptcy Court erred in ruling that Continental's obligation to integrate the former Eastern pilots into the Continental pilot seniority list constitutes a "claim" that is dischargeable pursuant to Section 101(5) of the Bankruptcy Code?

(3) Whether the Bankruptcy Court erred in ruling that no portion of ALPA's claim is entitled to administrative priority?

(D.I. 1).[6]

The third Order, entered on April 16, 1993, confirmed Continental's Plan of Reorganization. The Plan of Reorganization contained a permanent injunction enjoining ALPA and the LPP Claimants from submitting the LPP dispute to arbitration. In addition, the Plan of Reorganization expressly incorporated the February 11, 1993, Orders. Both ALPA (Civ. A. 93-50) and the LPP Claimants (Civ. A. 93-255) appeal from the bankruptcy court's confirmation of the Plan of Reorganization. Because the April 16, 1993, Order incorporates the February 11, 1993, Orders, the appeal of the April 16 Order presents those same issues. In addition, the following questions are raised: (1) whether the bankruptcy court erred by "re-adjudicating and incorporating" prior orders that were on appeal; and (2) whether the bankruptcy court erred in permanently enjoining

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[6] ALPA requests that the court "determine that the bankruptcy court lacked jurisdiction to determine the appropriate remedy for Continental's breach of LPPs because, pursuant to the terms of the LPPs, only an arbitrator can determine the appropriate remedy." (D.I. 9 at 6). In the alternative ALPA argues "that the future employment with seniority that ALPA seeks constitutes a right to equitable relief that cannot be settled as a general unsecured claim." (D.I. 9 at 6).

ALPA and the LPP Claimants from arbitrating the LPP dispute. (Civ. A. 93-255, D.I. 1).

The fourth Order, issued on September 9, 1994, denied the LPP Claimants' motion for an extension of time to appeal the Bankruptcy Court's July 19, 1994, Order which approved ALPA-Continental Settlement Agreement. The bankruptcy court stated in its Order of July 19, 1994, that "[a]pproximately two-thirds of the pilots have elected to participate in the Settlement, so that the Settlement disposes of the greatest bulk of claims, and greatly reduces the costs of litigation." (Civ. A. 94-496, D.I. 9 at A-79). Furthermore, the court held, "Those who objected [to the settlement] had the clear recourse of refusing to participate in the Settlement and retaining their claims. Approximately a third of the pilots did so." (Civ. A. 94-496, D.I. 9 at A-79). On August 15, 1994, Continental notified this court, and by carbon copy the LPP Claimants, that it intended to file a motion to dismiss the appeal of the LPP Claimants on the grounds that ALPA's settlement of the underlying claims was binding upon them. (Civ. A. 94-496, D.I. 9 at A-82). For the first time, the LPP Claimants had reason to believe that their LPP claims had been settled despite their non-participation in the Settlement Agreement. On August 18, 1994, the LPP Claimants filed a motion to extend the time to file a notice of appeal. The Bankruptcy Court denied this request. The LPP Claimants appeal that denial. (Civ. A. 94-496).

B. Motions

On May 18, 1993, Continental filed a motion to Dismiss the pending Appeals of ALPA and the LPP

Claimants as moot ("First Motion to Dismiss as Moot"). In that motion, Continental asserted that because the LPP Claimants and ALPA failed to move to stay the bankruptcy court's confirmation order approving Continental's Plan of Reorganization and because parties who invested in Continental did so in reliance on the February 11 Orders which were incorporated into that confirmation order, the court cannot now grant effective relief to ALPA or the LPP Claimants. As such, Continental argues that the appeals should be dismissed as moot. (D.I. 14).

On September 12, 1994, Continental filed another motion to dismiss the appeals of ALPA and the LPP Claimants as moot.[7] In the brief accompanying that motion Continental argued that ALPA represented the LPP Claimants in the Kasher Arbitration, which was the forum in which the LPP dispute was to be decided. (D.I. 49). ALPA has settled the LPP dispute with Continental. That Settlement Agreement was approved by the bankruptcy court on July 19, 1994. Therefore, argues Continental, ALPA and the LPP Claimants no longer have standing to prosecute the LPP dispute.

First, this court will address Continental's mootness motions. Then, each point of the appeals will be resolved *seriatim*.

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[7] This is the motion to which Continental had referred in its letter of August 15, 1994.

## III. DISCUSSION

### A. Motions

#### 1. First Motion to Dismiss as Moot

The issue presented by this motion is whether it is impossible or inequitable for this court to grant effective relief to the appellants. The United States Supreme Court has held that where "an event occurs while a case is pending on appeal that makes it impossible to grant 'any effectual relief whatever' to a prevailing party, then the appeal must be dismissed." *Church of Scientology of Cal. v. United States*, 506 U.S. 9, ___, 113 S.Ct. 447, 449 (1992) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). This is a constitutional restriction on the power of an appellate court. A federal court has "no authority" to declare rules of law that cannot affect the matter in issue. *Id.* Numerous Courts of Appeals have applied *Church of Scientology* under the rubric of constitutional mootness. *In re Best Products Co.*, 68 F.3d 26, 30 (2d Cir. 1995); *Brooks v. Georgia State Board of Elections*, 59 F.3d 1114, 1118-19 (11th Cir. 1995); *Nasatka v. Delta Scientific Corp.*, 58 F.3d 1578, 1580-81 (Fed. Cir. 1995); *National Football League Players Ass'n*, 56 F.3d 1525, 1528 (D.C. Cir. 1995); *In re Grand Jury Subpoenas Dated December 7 and 8*, 40 F.3d 1096, 1099 (10th Cir. 1994), *cert. denied sub nom. Nakamura v. United States*, 115 S.Ct. 1957 (1995).

The Third Circuit Court of Appeals has held that an appeal will be dismissed as moot when, during the pendency of an appeal, events occur which prevent the appellate court from granting effective relief. *In re Joshua Slocum Ltd.*, 922 F.2d 1081, 1085 (3d Cir. 1990); *In re Highway Truck Drivers & Helpers Local Union No.*

*107*, 888 F.2d 293, 297 (3d Cir. 1989); *In re Cantwell*, 639 F.2d 1050, 1053 (3d Cir. 1981); *In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 150 n. 6 (3d Cir. 1986).

In the case of *In re Swedeland Dev. Group, Inc.*, 16 F.3d 552, 559 (3d Cir. 1994), the Court of Appeals discussed "mootness predicated on statutory and prudential considerations." In a footnote, however, the court mentioned that the appeal of one of the orders "may have been moot in the district court on Article III constitutional grounds" because the court could "perceive of no relief which [could] be granted [upon] reversal." *Swedeland Dev. Group*, 16 F.3d at 559 n. 5. The court applied *Church of Scientology*, stating that an appeal is not moot if a court can fashion some form of meaningful relief, even if it is not full relief. The court noted that its decisions in *Cathcart* and *Cantwell* were in accord with *Church of Scientology*. *See Swedeland Dev. Group*, 16 F.3d at 560. In a previous decision, the Court of Appeals had ruled that the inability to grant effective relief was a constitutional barrier to the exercise of appellate jurisdiction. *See In re Abbotts Dairies of Pennsylvania, Inc.*, 788 F.2d 143, 150 n.6 (3d Cir. 1986).

The Second Circuit Court of Appeals has delineated constitutional mootness from equitable mootness in the bankruptcy context. The Second Circuit has found that where no effective relief whatsoever can be granted to the prevailing party, the appeal must be dismissed by virtue of the "case or controversy" requirement of Article III of the Constitution. *In re Best Products*, 68 F.3d at 30. Even where relief "could conceivably be fashioned," however, the case should be dismissed as moot if to grant the relief would be inequitable. *Id.* (quoting *In*

*re Chateauqay Corp.*, 988 F.2d 322, 325 (2d Cir. 1993)). In sum, if relief is impossible, the Constitution demands dismissal of the appeal. If relief is possible but inequitable, then equity compels dismissal. *See also In re Spirtos*, 992 F.2d 1004, 1006-07 (9th Cir. 1993) (appellate court must be able to fashion relief that is both effective and equitable); *In re Public Serv. Co. of New Hampshire*, 963 F.2d 469, 473 (1st Cir.), *cert. denied sub nom. Rochman v. Northeast Utils. Serv. Co.*, 113 S.Ct. 304 (1992) case may be ruled moot if, in light of intervening events, granting the requested relief would be either inequitable or impracticable).

Equitable mootness in bankruptcy proceedings "centers on the important public policy favoring orderly reorganization and settlement of debtor estates by affording finality to the judgments of the bankruptcy court.'" *In re Public Service Co. of New Hampshire*, 963 F.2d 469, 471-72 (1st Cir. 1992) (quoting *In re Revere Copper & Brass, Inc.*, 78 B.R. 17, 23 (S.D.N.Y. 1987)). The doctrine in the bankruptcy context requires the balancing of many factors, including (1) whether substantial consummation of the bankruptcy plan[8] or a comprehensive change in

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[8] Where the court cannot grant the relief requested without disturbing consummated transactions, a bankruptcy appeal will be dismissed as moot. *In re Delaware and Hudson Ry. Co.*, 129 B.R. 388, 395 (D.Del. 1991) (J. Latchum). The Second Circuit has held that substantial consummation will not moot the appeal if (1) a court can still order some effective relief; (2) such relief will not affect the emergence of the debtor from bankruptcy as a health corporate entity; (3) relief would not unravel intricate transactions and create an unmanageable situation for the bankruptcy court; (4) the parties adversely effected have notice of the appeal and an opportunity to participate; and (5) the appellant pursued a stay if the failure to do so

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circumstances has occurred; (2) whether the appellant has obtained a stay pending appeal; and (3) the nature of relief sought by appellant. *In re Combined Metals Reduction Co.*, 557 F.2d 179 (9th Cir. 1977).

In addition to these factors, courts have considered whether the relief requested might have a negative effect on third parties not before the court or would affect the reemergence of the debtor as a revitalized entity. *In re Public Service Co. of New Hampshire*, 963 F.2d 469, 474 (1st Cir. 1992); *In re Club Assocs.*, 956 F.2d 1065, 1069 n.11 (11th Cir. 1992); *Matter of Block Shim Dev. Co. – Irving*, 939 F.2d 289, 291 (5th Cir. 1991). In *Miami Center Ltd. Partnership v. Bank of New York*, 838 F.2d 1547, 1555 (11th Cir.), *cert. denied*, 488 U.S. 823 (1988), the court also considered "the passage of time." One bankruptcy court thought the primary consideration to be "the relative fault of the interested parties in creating the resulting unfortunate situation." *In re B. Cohen & Sons Caterers, Inc.*, 147 B.R. 369, 378 (Bankr. E.D.Pa. 1992). In sum, invoking the doctrine of equitable mootness requires some consideration of all of these factors.

The first factor to be considered is whether substantial consummation of the bankruptcy plan or a comprehensive change in circumstances has occurred. Substantial consummation, according to the Bankruptcy Code, means:

> (A) transfer of all or substantially all of the property proposed by the plan to be transferred; (B) assumption by the debtor or by the successor to

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created a situation in which it would be inequitable to reverse the order. *In re Chateauqay*, 10 F.3d 944, 952-53 (2d Cir. 1993).

> the debtor under the plan of the business or of the management of all or substantially all of the property dealt with by the plan; and (C) commencement of distribution under the plan.

11 U.S.C.A. § 1101(2). The existence of substantial consummation is not the end of the inquiry, but one step in the determination of whether effective relief can be granted. *In re AOV Indus., Inc.*, 792 F.2d 1140, 1148-49 (D.C. Cir. 1986), *vacated in part on other grounds*, 797 F.2d 1004 (D.C. Cir. 1986). Judge Farnam of this court has already found substantial consummation of Continental's Bankruptcy Plan. *See In re Continental Airlines, Inc.*, Civ. A. 93-195, D.I. 55 (D.Del. December 30, 1993) (memorandum opinion), *rehearing denied*, Civ. A. 93-195, D.I. 70 (D.Del. September 1994). This court agrees that the Plan of Reorganization has been substantially consummated.

The second inquiry is whether the appellant sought a stay of the order from which it appeals. An appellant has no obligation to seek a stay pending appeal. *Matter of T & H Diner, Inc.*, 108 B.R. 448, 451-52 (D.N.J. 1989). Furthermore, the failure to obtain a stay pending appeal does not alone moot the appeal when effective relief remains available. *In re Public Service Co. of New Hampshire*, 963 F.2d 469, 473 (1st Cir. 1992); *In re Club Assocs.*, 956 F.2d 1065, 1070 (11th Cir. 1992); *United Merchants*, 138 B.R. at 429. However, there are "a myriad of circumstances" in which obtaining a stay is necessary to preserve a party's position and avoid the progression of events and circumstances that might moot the appeal. *In re Highway Truck Drivers & Helpers Local 107*, 888 F.2d 293, 298 (3d Cir. 1989). Here, neither ALPA nor the LPP Claimants sought a stay of the orders from which they appeal. The Plan of

reorganization went forward and was substantially consummated.

A third aspect to the equitable balancing of interests concerns the relief requested by the parties. The appellants request several different remedies. ALPA and the LPP Claimants ask this court to find that the bankruptcy court had no jurisdiction to determine that their claims for equitable relief could be satisfied by money damages. The appellants also seek a ruling that any damages flowing from the LPP claims are entitled to administrative priority as wages, at least to the extent that those damages represent back and front pay that would have been earned while Continental was in bankruptcy. In essence, the LPP claimants want to take their claims to an arbitrator who would be empowered to grant both equitable and monetary relief, and then to recover any money damages that reflect post-petition back and front pay as an administrative priority.[9] This full measure of relief would jeopardize the Plan of Reorganization and could destroy the substantial post-bankruptcy progress of Continental.

The fourth step of the equity analysis requires the court to consider the potential effect of the requested relief on third parties not before the court. The relevant third parties are those who invested in Continental in reliance on the orders from which ALPA and the LPP Claimants appeal. The prevailing party may treat a bankruptcy court order as final, whether or not an appeal is pending. *T & H Diner,* 108 B.R. at 451-52. Thus, Continental and its

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[9] Because the LPP Claimants are not parties to the Kasher Arbitration, which has been settled, the LPP Claimants would essentially be starting anew in their efforts to integrate the seniority lists.

investors were not wrong to rely on the orders now on appeal. In the case of *In re Holywell Corp.*, 901 F.2d 931, 933 (11th Cir. 1990), *cert. denied, Miami Center Ltd Partnership v. Bank of New York*, 498 U.S. 1041 (1991), a bank purchased property in reliance on the bankruptcy court's determination of an interest rate. The court of appeals refused to tamper with the interest rate, because it "would strike at a crucial element of the reorganization plan" on which the investor had relied. *Id.* at 934. Yet, investors should consider the risk that a bankruptcy order will be reversed:

> We conclude that all parties proceeded to implement the plan with knowledge that the district court's determination was subject to reversal upon appeal. Thus, although challenging the plan or seeking a stay pending appeal was preferable, tenant's failure to do so does not render this appeal moot.

*In re Flagstaff Realty Assocs.*, 60 F. 3d 1031, 1036 (3d Cir. 1995).

In the case of *In re Information Dialogues, Inc.*, 662 F.2d 475, 476-77 (8th Cir. 1981), the Eighth Circuit recognized the tension between providing appropriate appellate review of bankruptcy court orders and allowing reorganizations to go forward in reliance on those orders. *See also, Club Assocs.*, 956 F.2d at 1065 (test for mootness balances "equitable considerations of finality and good faith reliance on a judgment" against "the right of a party to seek review of a bankruptcy court order"). The court in *Information Dialogues* held that where substantial elements of the reorganization plan have been implemented, where effective relief may not be able to be granted, and

where the appellant has failed to request a stay of the confirmation order, the equities favor dismissal. *Id.*

Another important consideration is whether the relief requested would affect the re-emergence of the debtor as a revitalized entity. Continental has emerged from bankruptcy. The airline is doing well. Granting the requested relief could put Continental back into bankruptcy, jeopardizing the successes of the past several years.

A final consideration is whether the passage of time would make any reversal of the bankruptcy court inequitable. The orders considered in this appeal were entered well over two years ago. Continental has relied on those orders in its reorganization. Outside investors have relied on those orders in deciding to invest in Continental. In bankruptcy proceedings the passage of time often brings changed circumstances. Having neglected to move for a stay, ALPA and the LPP Claimants cannot avoid the consequences: a substantially consummated Bankruptcy Plan built upon the reliance of third party investors.

When determining whether an appeal has been rendered moot, the district court must scrutinize each individual claim to determine whether effective relief may be granted. *Matter of Andrucetti,* 975 F.2d 413, 418 (7th Cir. 1992); *In re AOV Indus., Inc.,* 792 F.2d 1140, 1149 (D.C.Cir. 1986). Hence, an evaluation of each of the issues on appeal follows.

The administrative priority claim is dismissed for mootness.[10] The $450 million investment was conditioned

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[10] To the extent that the administrative priority claim is later found not to have been moot, this court holds that the appellants'

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upon an overall limit on administrative claims and upon a judicial determination that ALPA and the LPP Claimants were not entitled to equitable relief. That investment was, in the words of the bankruptcy court, "crucial to the feasibility of the [Reorganization] Plan."[11] To reverse the bankruptcy court on this matter could jeopardize the Plan of Reorganization and Continental's successful emergence from bankruptcy. Any relief this court might be able to fashion would be inequitable to Continental and its third party investors.

The challenge to the bankruptcy court's jurisdiction will not be dismissed as moot. An objection to subject matter jurisdiction may be raised at any time. *Booth v. United States,* 990 F.2d 617, 620 (Fed. Cir. 1993); *Huddleston v. Nelson Bunker Hunt Trust Estate,* 109 B.R. 197, 201 (N.D. Tex. 1989), *aff'd,* 935 F.2d 1290 (5th Cir. 1991). If the bankruptcy court had no jurisdiction, then its order is void. *See Williams v. Life Sav. and Loan,* 802 F.2d 1200 (10th Cir. 1986). Therefore, this court must determine whether the bankruptcy court had jurisdiction to determine that the equitable relief requested could be satisfied by a money judgment.

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claims are not entitled to administrative priority for the reasons expressed by Judge Latchum in *In re Continental Airlines, Inc.,* 148 B.R. 207 (D.Del. 1992).

[11] This fact distinguishes this case from *In re AppleTree Markets,* 1993 U.S. Dist LEXIS 8411 (S.D.Tex. May 24, 1993). In that case, the court found that "an explanation of how the various transactions consummated in reliance on the confirmed Plan or the survival of AppleTree as a viable business would be affected by a successful appeal of the order rejecting the CBAs" was "[n]otably absent" from the debtor's motion. *Id.* at *7. In the present case, a successful appeal on the issue of administrative priority would demolish a cornerstone of the Investment Agreement.

The question of whether the equitable right to seniority list integration gives rise to a right of payment, making it a claim in bankruptcy, is not moot. While one condition of the Settlement Agreement was a judicial determination that the appellants were not entitled to equitable relief, the conclusion that equitable relief may be granted would not give rise to the same draconian consequences as would a finding that the LPP claims are entitled to administrative priority. If this court were to find that the right to seniority list integration did not give rise to a right of payment, then the arbitrator would be free to order the fair and equitable integration of seniority lists. In making his or her decision, the arbitrator could take into account Continental's financial condition so as to prevent a slide back into bankruptcy.[12] Because an arbitrator could structure the integration of seniority lists in a way that would not unduly risk Continental's continued progress or the investments of third parties, this court will decide whether the asserted right to seniority list integration constitutes a claim in bankruptcy.

The other issues raised on appeal are not moot. If the bankruptcy court erred by incorporating the February orders into the April order, this court would not be required to strike down the entire Plan of Reorganization,

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[12] Continental argues that a "forced 'date of hire' seniority integration would entail up to $100 million in retraining costs" and the "displacement of thousands of Continental pilots." The court notes that this argument was made prior to the Settlement Agreement. The present consequences of seniority list integration would certainly be less drastic. In addition, the arbitrator is not required to integrate the seniority lists strictly by "date of hire." An arbitrator would be charged with integrating the seniority lists in a fair and equitable manner. If a strict "date of hire" integration scheme would be inequitable, an arbitrator would not order it.

but could fashion more limited relief. In addition, if the bankruptcy court erroneously granted the permanent injunction against arbitration, the remedy would be to vacate the injunction and allow arbitration to go forward. In light of the arbitrator's duty to achieve a fair and equitable result, the court feels confident that an arbitrator could fulfill that duty without jeopardizing the reorganization. Finally, Continental's First Motion to Dismiss as Moot does not encompass the appeal of the LPP Claimants for additional time to appeal the approval of the Settlement Agreement.

In sum, the claim for administrative priority for back and front pay which arose after Continental's petition for bankruptcy was filed is moot. All other claims survive Continental's First Motion to Dismiss as Moot.

2. Second Motion to Dismiss as Moot

The issue raised in the Second Motion to Dismiss as Moot is whether the Settlement Agreement signed by ALPA moots the LPP dispute, thereby mooting the appeal of both ALPA[13] and the LPP Claimants. Continental argues that it has settled with the only party capable of asserting the right to seniority list integration, so the LPP dispute is now moot. While the parties dispute whether ALPA represents the LPP Claimants, representation is irrelevant.[14] The issue is whether individual pilots can

[13] Continental does not seek to enforce the promise made by ALPA to withdraw its appeal. This court, sitting as an appellate court, will not do so *sua sponte*.

[14] If ALPA was not the collective bargaining representative of the LPP Claimants, then it could not settle the claims of the LPP Claimants. If ALPA was the collective bargaining representative of the LPP

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assert a right to seniority list integration under the collective bargaining agreement, and if so, whether the Settlement Agreement disposes of those rights.

The reply brief of Continental demonstrates that the Settlement Agreement had no effect at all on the rights of the LPP Claimants:

> The settlement was plainly intended to leave individual pilots in the same position they were prior to the settlement – no better, no worse.

(D.I. 55 at 2). The language of the Settlement Agreement, and the briefs of the other parties, support this statement. Thus, Continental cannot seriously claim that the settlement mooted the appeals. Rather, Continental asserts that the seniority integration rights were group rights that could only be asserted by ALPA, and the individual LPP Claimants *never* had standing to bring the LPP claims.[15]

The substantive issue is, as previously noted, whether the LPP Claimants have individual rights to seniority integration under the LPPs. Before reaching that issue, however, this court must decide that it, rather than an arbitrator, has the power to make that determination. This depends upon whether seniority is a "major dispute" or a "minor dispute."

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Claimants, then while ALPA had the power to settle the claims of the LPP Claimants, the language of the Settlement Agreement makes clear that ALPA did not settle those claims.

[15] Continental does not claim that the LPP Claimants have no standing on appeal. Because the second February 1993 Order specifically bound the LPP Claimants, they have standing to appeal that order.

As stated by the Supreme Court, "major disputes seek to create contractual rights, minor disputes to enforce them" *Consolidated Rail Corp. v. Railway Labor Executives' Ass'n,* 491 U.S. 299, 302 (1989). A minor dispute "relates either to the meaning or proper application of a particular provision. . . . " *Id.* at 303 (quoting *Elgin, J. & E.R. Co. v. Burley,* 325 U.S. 711, 723 (1945)); *see also United Transp. Union v. Conemaugh & Black Lick R.R. Co.,* 894 F.2d 623, 628 (3d Cir. 1990) ("minor dispute concerns the meaning and application of provisions of the negotiated agreement"). The burden of showing that a dispute is minor is "relatively light." *General Comm. of Adjustment, United Transp. Union, Western Maryland Ry. Co. v. CSX R.R. Co.,* 893 F.2d 584, 591 (3d Cir. 1990). When in doubt, courts construe the dispute as minor. *Id.; Air Line Pilots Ass'n v. Eastern Air Lines,* 869 F.2d 1518, 1521-22 (D.C.Cir. 1989); *Chicago & North Western Transp. Co. v. International Bhd. of Elec. Workers, Local Union No. 214,* 829 F.2d 1424, 1428-29 (7th Cir. 1987).

The LPP dispute is a minor dispute. The controversy involves whether the Eastern and Continental have "merged" within the meaning of the LPPs which are part of the collective bargaining agreement. A district court's role in minor disputes is limited to protecting the jurisdiction of the arbitration board *Chicago & North Western Transp. Co. v. International Bhd. of Elec. Workers, Local union No. 214,* 829 F.2d 1424, 1428 (7th Cir. 1987). The federal court cannot consider the merits of the underlying dispute or the remedy that might be appropriate. *General Comm. of Adjustment, United Transp. Union v. CSX Railroad Co.,* 893 F.2d at 592-93; *Air Line Pilots Ass'n v. Eastern Air Lines,* 869 F.2d 1518, 1521 (D.C.Cir. 1989).

The issue of whether the LPP Claimants have individual rights to seniority integration under the LPPs is not properly before this federal district court.[16] Therefore, this court will not dismiss the claims of the LPP claimants based on their alleged lack of standing to assert the contractual right to seniority integration.[17]

B. Standard of Review

The bankruptcy court's conclusions of law are subject to *de novo* review. *Meridian v. Alten,* 958 F.2d 1226, 1229 (3d Cir. 1992); *Matter of Spencer,* 115 B.R. 471, 473 (D.Del. 1990). The factual findings of the bankruptcy court may not be set aside unless clearly erroneous. Bankruptcy Rule 8013; *Landon v. Hunt,* 977 F.2d 829, 830 (3d Cir. 1992).

C. Merits of the Appeals

1. Jurisdiction of Bankruptcy Court

ALPA and the LPP Claimants argue that the Bankruptcy Court did not have the power to determine that the LPP claims could be satisfied by monetary awards rather

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[16] Jurisdiction may lie with an adjustment board in accordance with its normal jurisdiction over minor disputes, or jurisdiction may lie with a Section 13 LPP Arbitrator as provided by the LPPs. The issue of which of those two fora is appropriate is not properly raised in this appeal.

[17] There is administrative precedent for the proposition that the LPP Claimants may individually assert their seniority rights. *See, e.g., In re North Central-Southern Merger Case,* 82 C.A.B. 1, 1979 WL 21508, *63, Orders 79-6-7, 79-6-8 (May 15, 1979) ("labor protective provisions represent a formula for protecting individual employees" from hardships involved with merger. "The spouses as individuals are clearly entitled to the benefit of the labor protective conditions").

than by specific performance directing the equitable integration of the Eastern and Continental seniority lists. The appellants claim that the collective bargaining agreement provided for such decisions to be made by an arbitrator from the National Mediation Board.

As an initial matter it must be noted that the Bankruptcy Court did *not* hold that ALPA and the LPP Claimants were not entitled to equitable relief. Rather, the court held that any right to equitable relief could be reduced to money damages as an alternative to specific performance. Contrary to ALPA's assertions, the Bankruptcy Court did not encroach upon the jurisdiction of the arbitrator to determine an appropriate remedy for a breach of the LPPs. The bankruptcy court simply decided that any equitable remedy could be reduced to a right of payment, thereby making the right to seniority list integration a "claim" in bankruptcy.

This was within the jurisdiction of the bankruptcy Court. The determination of whether the right to the integration of seniority lists is a "claim" under 11 U.S.C. § 101(5)(B) is a "core" bankruptcy matter. *See* 28 U.S.C. § 1334; 28 U.S.C. § 157; *In re Leco Enters., Inc.*, 144 B.R. 244, 248 (S.D.N.Y. 1992) (cases arising under Title 11 are "at the core of the jurisdiction of the bankruptcy courts"). It arises directly under the Bankruptcy Code. There can be no question, therefore, that the Bankruptcy Court properly exercised its jurisdiction.

2. "Claim" Under Section 101(5)

Having decided that the Bankruptcy Court properly exercised its jurisdiction to determine that the alleged right to seniority list integration was a claim under 11

U.S.C. § 101(5), the court must now determine whether the Bankruptcy Court's decision on that issue was correct.

The United States Code defines the term "claim" in bankruptcy, in relevant part, as a "right to an equitable remedy for breach of performance if such breach gives rise to a right of payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmeasured, disputed, undisputed, secured or unsecured." 11 U.S.C. § 101(5)(B). This language has been interpreted to be the "broadest available definition" of that term. *Johnson v. Home State Bank,* 501 U.S. 78, 82 (1991); *Matter of Udell,* 18 F.3d 403, 406 (7th Cir. 1994). The essential question is whether the right to the integration of seniority lists gives rise to a "right of payment." The Supreme Court has stated that a "right to payment" is nothing more than an enforceable obligation. *Pennsylvania Dep't of Public Welfare v. Davenport,* 495 U.S. 552, 559 (1989) (holding that the obligation to make restitution payments for welfare fraud falls within definition of claim).[18]

The major Supreme Court case elucidating the term "right to payment" is *Ohio v. Kovacs,* 469 U.S. 274 (1985). In that case the state sought "money to defray [environmental] cleanup costs" in lieu of the enforcement of an injunction ordering the cleanup. *Id.* at 279, 283. The court found that the injunction gave rise to a right to payment. *Id.* at 283. Here, ALPA and the LPP Claimants want more

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[18] While the result of *Davenport* was overruled by the Criminal Victims Protection Act of 1990, the rationale of the decision remains unscathed. *Johnson,* 501 U.S. at 83-84 n.4.

than just money. They want the actual equitable integration of the seniority lists, as well as back pay and front pay during a period of retraining.

Courts have taken several divergent approaches in the interpretation of *Kovacs*.[19] One court has interpreted *Kovacs* to mean that "[i]f an expenditure of money is required to perform the obligation, then the affirmative duty gives rise to a 'claim'. . . . " *In re May* 141 B.R. 940, 943 (Bankr. S.D.Ohio 1992).[20] The Fifth Circuit has explained that the definition of "claim" is "designed to cause the liquidation of contingent claims for money damages that are alternatives to equitable remedies." *Matter of Davis,* 3 F.3d 113, 116 (5th Cir. 1993). One example of a right to an equitable remedy that gives rise to a right to payment is a right to specific performance with an alternative right to damages. *See Kovacs,* 469 U.S. at 280 (quoting legislative history); *In re Perry,* 131 B.R. 763, 766 (Bankr. D. Mass. 1991).

The Seventh Circuit Court of Appeals found that in addition to when damages are an "alternative" to the right to an equitable remedy, the right to payment "must at

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[19] At least one court has ignored *Kovacs. See In re Blue Diamond Coal Co.,* 147 B.R. 720 (Bankr. E.D.Tenn. 1992), *aff'd,* 160 B.R. 574 (E.D.Tenn. 1993). There the court held that "[b]ecause the Union may sue to enforce the terms of the Agreement outside of bankruptcy, it has a 'right to payment' sufficient to support a claim in bankruptcy." Clearly, this is not the appropriate test.

[20] This is an overly simplistic reading of *Kovacs.* In *Kovacs,* the Court emphasized that Ohio was not attempting to get Kovacs to personally clean up the property, but was simply seeking money for the remediation. Such a distinction would be irrelevant under the rationale of *May,* because Kovacs would have had to expend money either to personally clean up the property or to pay the state.

least arise 'with respect to' the equitable remedy, not apart from it." *Matter of Udell,* 18 F.3d at 407. According to the Seventh Circuit, the focus is on whether equitable and monetary remedies address "entirely separate remedial concerns." *Id.* at 409. If so, then the equitable remedy does not give rise to the monetary remedy. *Id.* Finding that a stipulated damages clause and an injunction requiring Mr. Udell not to compete with his former employer gave rise to separate remedial concerns with no "derivative relationship," the court held that the injunction was not a claim. *Id.* at 409.

The Third Circuit addressed the interpretation of "right to payment" in the case of *In re Torwico Elecs., Inc.*, 8 F.3d 146, 150 (3d Cir. 1993), *cert. denied sub nom. Torwico Elecs., Inc. v. New Jersey Dep't of Environmental Protection and Energy*, 114 S.Ct. 1576 (1994).[21] The Court of Appeals rested its decision upon the distinction between environmental enforcement efforts that can be fulfilled through the payment of money and those that cannot. The court explained that a prospective obligation to clean up hazardous waste did not constitute a claim in bankruptcy where the debtor "had no option to pay for the right to allow its wastes to continue to seep into the environment." Id. at 151 n. 6; see also, In re Chateaugay, 944 F.2d 997, 1009 (2d Cir. 1991) (to the extent that CERCLA affords a right to payment in lieu of an order directed solely at

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[21] In that decision, the Third Circuit marginalized, relative to the issues in this appeal, its decision in *Penn Terra Ltd. v. Department of Environmental Resources,* 733 F.2d 267 (3d Cir. 1984). The court distinguished *Penn Terra* as addressing the automatic stay provisions of § 362 rather than the definition of claim under § 101(5). *See Torwico,* 8 F.3d at 150 n. 2.

cleanup, such an order is a claim); *United States v. Hubler*, 117 B.R. 160, 165 (W.D.Pa. 1990), *aff'd*, 928 F.2d 1131 (3d Cir. 1991) (plaintiff did not and cannot convert defendants' obligations into monetary liability so they are not "claims"). The equitable right to environmental remediation could not be exchanged for a right of monetary payment.

The relevant question here is whether monetary damages are a viable alternative to the actual integration of the Eastern and Continental seniority lists. If Continental's obligation to integrate seniority lists can be converted into a monetary liability (i.e. damages for the alleged breach of the collective bargaining agreement rather than specific performance), then it is a "claim." All appropriate remedies are available to enforce violations of the Railway Labor Act. *CSX Transp. Inc. v. Marquar*, 980 F.2d 359, 365 (6th Cir. 1992). Indeed, money damages for violations of the Railway Labor Act were regarded as a proper judicial remedy prior to the remedy of reinstatement. *See Brady v. Trans World Airlines, Inc.*, 401 F.2d 87, 102-03 (3d Cir. 1968), *cert. denied*, 393 U.S. 1048 (1969). While this case involves not so much a violation of the Railway Labor Act as a breach of a collective bargaining agreement under the Railway Labor Act, a monetary remedy is not precluded.

Courts generally view front pay as an "alternative" to reinstatement. *See Goss v. Exxon Office Sys. Co.*, 747 F.2d 885, 890 (3d Cir. 1984) ("future lost earnings in Title VII cases is an alternative to the traditional equitable remedy of reinstatement"); *see also, Seymour v. Olin Corp.*, 666 F.2d 202, 211 (5th Cir. 1982) (prospective damages may be granted if reinstatement is impractical); *Soto Segarra v. Sea-land Serv., Inc.*, 581 F.2d 291, 297 (1st Cir. 1978)

(same); *de Arroyo v. Sindicato De Trabajadores Packing, AFL-CIO*, 425 F.2d 281, 292 (1st cir. 1970), *cert. denied sub nom. Puerto Rico Telephone Co. v. de Arroyo*, 400 U.S. 877 (1970) (same).

There is no persuasive reason to distinguish the equitable remedy of seniority list integration from the equitable remedy of reinstatement. A wrongful denial of seniority in a merged airline is wholly analogous to wrongful discharge. Both deprive employees of jobs that rightfully belong to them. Front pay can be an alternative remedy for both. In sum, this court holds that front pay is an alternative remedy to seniority list integration.[22] Therefore, the Bankruptcy Court did not err when it held that the right to seniority list integration gave rise to a right of payment and, as such, is a "claim" within the meaning of 11 U.S.C. § 101(5)(B).

3. Incorporating Appealed Orders Into New Order

ALPA questions whether the incorporation of the February 11 Orders into the April 16 Order constitutes a violation of res judicata. ALPA argues that the February 11 Orders were final judgments on the merits of the LPP claims, so that res judicata barred any subsequent action involving the same claim, "prohibiting either Continental or ALPA from relitigating the underlying merits before the bankruptcy court." Thus, ALPA reasons that no new

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[22] Furthermore, the right to damages arises "in respect to" the integration of seniority lists. *See Matter of Udell*, 18 F.3d at 407. If there is no right to the integration of seniority lists, then there is no right to back pay and limited front pay. The money damages are "derivative" of the equitable remedy.

judgment on the same matter could issue from the bankruptcy court. (D.I. 30 at 16-20).

As a factual matter, the bankruptcy court did not relitigate the underlying merits of the February 11 Orders. It simply restated and incorporated its prior findings. Regarding ALPA's legal contentions, they do not concern res judicata, i.e. claim preclusion, because the February 11 Orders and April 16 Order were issued in the same case. Law of the case is the applicable doctrine. *Hull v. Freeman*, 991 F.2d 86, 90 (3d Cir. 1993); *In re Justice Oaks II, Ltd.*, 898 F.2d 1544, 1549 n. 3 (11th Cir.), *cert. denied* 498 U.S. 959 (1990). The law of the case doctrine is applied subject to the court's discretion. *Coca-Cola Bottling Co. of Shreveport v. Coca-Cola Co.*, 988 F.2d 414, 429 (3d Cir. 1993), *cert. denied*, 114 S.Ct. 289 (1993). It does not limit the tribunal's power. *Arizona v. California*, 460 U.S. 605, 618 (1983). Law of the case provides that when a court decides a rule of law, that rule governs the remainder of the litigation. *Matter of Resyn Corp.*, 945 F.2d 1279, 1281 (3d Cir. 1991).[23]

The February 11, 1993, Orders were law of the case on April 16, 1993. Judge Balick properly relied on them in deciding whether the Plan of Reorganization was feasible. ALPA attempts to distinguish the Bankruptcy Court's reliance on the Orders, to which ALPA does not object, with the actual incorporation of the prior Orders, to which

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[23] There are three primary exceptions to this rule: (1) when the right to move for reconsideration would be effectively denied; (2) when new evidence is available; and (3) when there has been a supervening rule of law. *Schultz v. Onan Corp.*, 737 F.2d 339, 345 (3d Cir. 1984) (quoting *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 169-70 (3d Cir. 1982)).

ALPA strenuously objects. ALPA has submitted neither precedent nor persuasive argument to support this distinction. This court can find no basis for holding that the bankruptcy court exceeded its power by incorporating previously rendered, relevant Orders into a subsequent Order.

4. Permanent Injunction

ALPA argues that the permanent injunction prohibiting the future arbitration of the LPP claims violated Fed.R.Civ.P. 65(d) and 11 U.S.C. § 1113.

On April 16, 1993, Judge Balick confirmed the Plan of Reorganization. (D.I. 31 at A-712). The Plan of Reorganization contained a permanent injunction in Section 12.19 (D.I. 31 at A-442). Basically, the injunction prohibited ALPA and the LPP Claimants from commencing or continuing an arbitration or other proceeding outside the bankruptcy court to determine whether Continental is liable for monetary or equitable relief for its failure to integrate the seniority lists.

Rule 65(d) of the Federal Rules of Civil Procedure provides the requisite form and scope of injunction issued by federal courts:

> Every order granting an injunction . . . shall set forth the reasons for its issuance; shall be specific in terms; shall describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained; . . .

This Rule is made applicable to the Bankruptcy Court by Bankruptcy Rule 7065 which provides that Fed.R.Civ.P.

65(d) applies to adversary proceedings, excepting applications for temporary restraining orders or preliminary injunctions. Because the injunction at issue is permanent, not preliminary or temporary, Fed.R.Civ.P. 65(d) applies. The question at issue is whether the Order granting the permanent injunction (1) adequately sets forth the reasons for its issuance and (2) describes the acts restrained without reference to any other document, i.e. the Plan of Reorganization.

Continental asserts that paragraphs 32 and 33 in the April 16, 1993, Order confirming the Plan of Reorganization, as well as the incorporated February 11 Orders, adequately set forth the reasons for the injunction. In those paragraphs of the April 16 Order, the Bankruptcy Court explained that Continental had requested the court "to adjudicate the priority of the Eastern Claims and the extent to which, if any, the claimants thereon are entitled to specific performance or other injunctive, equitable or other prospective relief. . . . "[24] The court incorporated its February 11, 1993, Orders which were the result of the requested adjudication. The court further found that if the claims were "ultimately found to be valid" they would give rise to a right of payment which made them dischargeable "claims." The court did not explain why the court was prohibiting an arbitrator or other tribunal from determining whether those claims were valid. The court gave no reasons for its adoption of Section 12.19 of the Plan of Reorganization titled "Injunction Relating to Eastern Claims."

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[24] The Bankruptcy Court was not requested to determine the *merits* of the LPP claims or the extent to which ALPA and the LPP Claimants were entitled to monetary remedies.

In addition, the terms of the Order itself do not explain that no arbitrator or court, other than the Bankruptcy Court, may determine whether the LPP claims actually were valid. In fact, if one were to read the Order, without reference to the Plan of Reorganization, there is absolutely no notice of an injunction as described in Section 12.19 of the Plan of Reorganization. Even if the parties were on notice of the language of the Plan of Reorganization (and certainly they were), without a separate court document setting forth that which is prohibited, an injunction is not effective. *See Bates v. Johnson*, 901 F.2d 1424, 1428 (7th Cir. 1990) ("When a judge does not record an injunction ... on a separate document, the defendant is under no judicial compulsion"); *Seattle-First Nat'l Bank v. Manges*, 900 F.2d 795, 800 (5th Cir. 1990) ("although reference to the magistrate's findings and recommendation and to the TRO clearly would give ... specific guidance as to the prohibited behavior, the order fails to comply with Rule 65(d)); *Thomas v. Brock,* 810 F.2d 448, 450 (4th Cir. 1987) (striking section of injunction that refers to findings of fact and conclusions of law issued the same day).[25]

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[25] This court specifically rejects the reasoning of the Ninth Circuit Court of Appeals in *Davis v. City and County of San Francisco*, 890 F.2d 1438, 1450-51 (9th Cir. 1989), *cert. denied sub nom. San Francisco Fire Fighters Local 798 v. City and County of San Francisco*, 498 U.S. 897 (1990). In that case, the district court had incorporated fire department rules ("Sections of the SFFD General Order") into an injunction. The Court of Appeals found it "unlikely" that the officers enjoined "could argue they were unaware of these rules." *Id.* at 1450 Because the 'primary purpose of Rule 65(d) is to assure adequate notice to parties," the court declined to reverse the injunction. This argument impermissibly neglects the plain meaning of the rule which requires specificity without reference to another document.

In sum, there is neither a statement of reasons for the issuance of an injunction as described in Section 12.19 of the Plan of Reorganization, nor is there a description within the Order of the acts purportedly restrained by that section. An injunction that fails to meet the requirements of Rule 65(d) will not withstand appellate scrutiny. *Diapulse Corp. of America v. Carba, Ltd.*, 626 F.2d 1108, 1111 (2d Cir. 1980). The injunction provided in Section 12.19 of the Plan of Reorganization is ineffective.

The confirmation Order also restates, with certain modifications, 11 U.S.C. § 524. This statutory injunction applies whether or not it is included in a bankruptcy court's Order. Therefore, the statutory injunction survives. However, the specific injunction regarding ALPA and the LPP Claimants included in Section 12.19 of the Plan of Reorganization fails to meet the requirements of Fed.R.Civ.P. 65(d) and is invalid.

ALPA also argues that 11 U.S.C. § 1113 protects ALPA's contractual right under the LPPs to arbitrate the issue of seniority list integration. Section 1113 provides a procedure for a debtor to assume or reject a collective bargaining agreement. For purposes of the motion for summary judgment from which these appeals were taken, counsel for Continental assumed that Continental was bound by and breached the LPPs. The LPPs were included in the collective bargaining agreement. Therefore, counsel for Continental assumed that Continental was bound by and breached a section of the Eastern-ALPA collective bargaining agreement.

Continental argues that § 1113 applies only when there is a collective bargaining agreement and an ongoing

collective bargaining relationship. (D.I. 35 at 21). Continental asserts that ALPA has conceded in the past that "the LPP Claims do not involve a collective bargaining agreement, a bargaining relationship, or the imposition of the 'terms and conditions' of the Eastern-ALPA collective bargaining agreement on Continental." (D.I. 35 at 22). This wholly misstates ALPA's contentions. The LPP claims do involve a collective bargaining agreement. The Eastern-ALPA collective bargaining agreement has been interpreted to include the LPPs. ALPA does not claim that the Eastern-ALPA collective bargaining agreement is applicable to the relationship between Continental and the Continental pilots.[26] Rather, ALPA contends that as the carrier with whom Eastern allegedly merged, Continental has a duty to integrate its pilot seniority list with that of Eastern. There is at least some precedent for this argument. *See National Airlines Acquisition, Arbitration*, 95 C.A.B. 584, 1982 WL 35318 at *1 (April 15, 1982) ("pursuant to section 3, the surviving carrier of an acquisition or merger and the effected employees . . . are responsible for integrating seniority lists").

Assuming that Continental had this duty, as Continental assumed below, the question is whether the rejection of this duty must be achieved through the provisions of 11 U.S.C. § 1113. It is undisputed that Continental's alleged duties to integrate seniority lists and to arbitrate the dispute if bargaining was unsuccessful arise from the LPPs. It is also undisputed that the LPPs have been interpreted to be a part of the Eastern-ALPA collective

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[26] As a result, Continental's argument that bargaining with ALPA over seniority list integration would be "impossible, and even unlawful" is not well taken.

bargaining agreement. To the extent that Continental seeks to abrogate its responsibilities under the collective bargaining agreement, it must do so in accordance with the procedures of the Bankruptcy Code, specifically § 1113.

Continental argues, however, that even if § 1113 does apply to the current controversy (and it does), § 1113 cannot be interpreted as a partial implied repeal of the "provisions of the Code empowering a bankruptcy court to rule on the status of the claims against a debtor."[27] Continental's argument is not accepted. To the extent that provisions of the Bankruptcy Code conflict with § 1113, the plain language of § 1113 controls:

> No provision of this title shall be construed to permit a trustee[28] to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.

11 U.S.C. § 1113(f). "Subsection 1113(f) evinces an intent that other provisions of the Bankruptcy Code are inoperable to the extent that they allow a debtor to bypass the requirements of § 1113." *In re Ionosphere Clubs, Inc.*, 922 F.2d 984, 989 (2d Cir. 1990). Because Continental's alleged duties to integrate seniority lists upon merger and to arbitrate disputes about seniority integration arise from the collective bargaining agreement and because the

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[27] Because Continental does not identify the statutory provisions allegedly in jeopardy of implied partial repeal, it is exceedingly difficult to evaluate its arguments.

[28] The term "trustee" as used in § 1113(f) includes a debtor in possession. *See* 11 U.S.C. § 1113(b)(1) ("hereinafter in this section 'trustee' shall include a debtor in possession").

collective bargaining agreement has not been rejected in accordance with the provisions of § 1113, those obligations remain intact.

Having decided that Continental has a duty to arbitrate the LPP dispute, under the assumption that Continental was bound by the LPP provisions, the question becomes whether the Bankruptcy Court could properly enjoin that arbitration.[29] The case of *In re Ionosphere, Inc.*, 922 F.2d 984 (2d Cir. 1990) is instructive. That case involved the same LPPs at issue in the present case. The Second Circuit found that

> adjudication of this dispute in the bankruptcy court would nullify effectively the arbitration clause in the collective bargaining agreement and would substitute the court's judgment for that of the arbitrator.
>
> The collective bargaining agreement expressly provides for arbitration as the method of dispute resolution.

*Id.* at 992. The bankruptcy court does have jurisdiction to decide the merits of the LPP claims. *See* 28 U.S.C. § 157. Yet, exercise of that jurisdiction would abrogate the provision of the collective bargaining agreement that mandated arbitration. Therefore, the bankruptcy court should have allowed an arbitrator to determine the merits

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[29] This court has already found that the Bankruptcy Court did not effectively enjoin the arbitration because the injunction did not comply with Fed.R.Civ.P. 65(d). The court is now considering whether upon remand the Bankruptcy Court could properly enter an injunction prohibiting arbitration of the LPP dispute.

of the LPP claims against Continental.[30] This in no way restricts the bankruptcy court's authority to determine the priority of those claims. Any arbitration award would be, in accordance with the bankruptcy court's determination, a general unsecured pre-petition claim.[31]

The appropriate remedy under these circumstances is to vacate the injunction, which this court hereby orders. *See Newark Stereotypers' Union No. 18 v. Newark Morning Ledger Co.*, 353 F.2d 510 (3d Cir. 1965) (vacating injunction and remanding to district court for proceedings consistent with opinion); *Mayflower Indust. v. Thor Corp.*, 182 F.2d 800, 801 (3d Cir. 1950) (dissolving injunction); *Alberti v. Cruise*, 383 F.2d 268, 272 (4th Cir. 1967) (remanding to district court with directions to vacate injunction); *see also, Hartford-Empire Co. v. United States*, 323 U.S. 386, 410, *supplemented*, 324 U.S. 570 (1945) (approving the elimination of section of injunction enjoining violations "as charged in complaint"); *Louis W. Epstein Family Partnership v. Kmart Corp.*, 13 F.3d 762, 772 (3d Cir. 1994) (remanding to district court with instructions to

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[30] The court does not imply that an arbitrator should reach any particular decision. In fact, an arbitrator may decide not to reach a decision on the merits. *See, e.g., Seaboard Acquisition*, 1983 WL 35470 (C.A.B. December 15, 1983) (dismissing seniority integration petition for delay in bringing claim).

[31] The court realizes that the right to arbitrate the LPP dispute may be of limited practical utility to the LPP Claimants. Any award that might be granted by the arbitrator would be an unsecured pre-petition claim and may come after the assets of the bankruptcy estate have been wholly depleted. While there was some evidence in the record of a reserve of unallocated stock (D.I. 15, Exhibit I, pp. 25-26), there is no evidence that such a reserve still exists or that it would exist at the time such an arbitration award might be granted.

strike from injunction an indefinite catch-all provision);[32] *but see, Manges*, 900 F.2d at 800 (remanding to district court with instructions to reform the injunction); *Mitchell v. Seaboard System R.R.*, 883 F.2d 451, 454 (6th Cir. 1989) (drafting injunction and remanding to district court for its entry). To do any less than vacate the injunction would disregard the important public policies served by Rule 65(d) as articulated by Judge Wyzanski in *H.K. Porter Co. v. National Friction Prods. Corp.*, 568 F.2d 24 (7th Cir. 1977). There is no need to remand this matter to the bankruptcy court because (1) the injunction is invalid under Fed.R.Civ.P. 65(d) and is hereby vacated and (2) the bankruptcy court may not, in light of § 1113, enjoin the arbitration even if a new injunction met the requirements of Fed.R.Civ.P. 65(d).

5. Extension of Time to Appeal From Settlement

On September 9, 1994, the bankruptcy court denied the LPP Claimants' August 18, 1994, motion to extend the time to appeal the bankruptcy court's July 19, 1994, Order approving the Settlement Agreement of ALPA and Continental. The issue is whether the bankruptcy court erred in refusing to extend the time for the LPP Claimants to file an appeal.

In accordance with Bankruptcy Rule 8002(c), the bankruptcy court "may" extend the time for filing the notice of appeal for a period not to exceed 20 days from the

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[32] The court notes that the Third Circuit in *Epstein Family Partnership*, did not remand for a more explicit or definite statement of prohibited activity.

expiration of time otherwise prescribed. The request for an extension must come within the 10 days allotted for filing the appeal. If within 20 days after the expiration of those 10 days a party can show "excusable neglect" for failing to provide notice of appeal, then the appeal may be allowed. Because the LPP Claimants moved for an extension of time within 20 days after the expiration of the original 10 day period, the bankruptcy court was permitted to grant the extension of time if the LPP Claimants showed excusable neglect.

The parties agree that this court reviews the denial of an extension of time to appeal for an abuse of discretion. *See Manhattan-Ward, Inc. v. Grinnell Corp.*, 490 F.2d 1183, 1186 (2d Cir. 1974); *Linder v. Trump's Castle Assocs.*, 155 B.R. 102, 104 (D.N.J. 1993); *In re Cordry*, 149 B.R. 970, 976 (D.Kan. 1992); (Civ. A. 94-496, D.I. 8 at 3 and D.I. 11 at 3).

In the Order approving the Settlement Agreement the bankruptcy court ruled:

> Continental is authorized to accept further elections by eligible pilots to participate in the Settlement Agreement for a period sixty (60) days from the date of this Order, such further elections shall be treated as timely in all respects for all purposes under the Settlement Agreement. All other time periods or deadlines contained in the Settlement are also hereby extended by sixty (60) days.

The LPP Claimants interpreted this language as not only expanding the time by which an eligible pilot could decide to participate in the Settlement Agreement but also as expanding the period for an eligible pilot to appeal the

Order approving the Settlement Agreement. (Civ. A. 94-496, D.I. 8 at 6).

In denying the motion for an extension of time, Judge Balick stated that the court did not extend the deadline for appeal by sixty days and, in fact, was not empowered to do so. (Civ. A. 94-496, D.I. 9 at A-117). Furthermore, the bankruptcy court found that "the neglect is not excusable" and that there would be "prejudice to the debtor and to the unsecured creditors." (Civ. A. 94-496, D.I. 9 at A-110).

The bankruptcy court did not abuse its discretion in denying the request for an extension of time to appeal. It fully considered the arguments of counsel, balanced the relevant factors and found that the actions of the LPP Claimants did not constitute excusable neglect. This court agrees with the bankruptcy court that the Order approving the Settlement Agreement cannot fairly be read to expand the time for appeal. Rather, it expanded the time for pilots to decide whether or not to participate in the Settlement Agreement. Therefore, the appeal of the LPP Claimants in Civ. A. 94-496 is denied. The LPP Claimants may not appeal the Order approving the Settlement Agreement.

## IV. CONCLUSION

The decisions of the bankruptcy court are affirmed in part and reversed in part. The appeals originally captioned Civ. A 93-163, 93-164, 93-177, 93-178, and 94-496 are denied, and the bankruptcy court is affirmed. The appeals originally captioned 93-250 and 93-255 are granted in part and denied in part.

The permanent injunction contained in Section 12.19 of the Plan of Reorganization is vacated. Otherwise, the bankruptcy court's orders of February 11, 1993; April 16, 1993; and September 9, 1994, are affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

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| In re: CONTINENTAL AIRLINES, INC. et al., Debtors, | Bankruptcy Court Case Nos. 90-932 through 90-984 |
| AIRLINE PILOTS ASSOCIATION, INTERNATIONAL, and LPP CLAIMANTS, Appellants, v. CONTINENTAL AIRLINES, INC. et al., Appellees. | C.A. No.: 93-163, 93-164, 93-177, 93-178, 93-250, 93-255, 94-496<br>Consol. 93-163 LON<br>ORDER |

NOW, THEREFORE, for the reasons set forth in the Court's Memorandum Opinion issued this date,

IT IS ORDERED that:

1. The appeal originally captioned 93-163 is denied, and the bankruptcy court's Order is affirmed.

2. The appeal originally captioned 93-164 is denied, and the bankruptcy court's Order is affirmed.

3. The appeal originally captioned 93-177 is denied, and the bankruptcy court's Order is affirmed.

4. The appeal originally captioned 94-178 is denied, and the bankruptcy court's Order is affirmed.

5. The appeal originally captioned 94-496 is denied, and the bankruptcy court's Order is affirmed.

6. The appeals originally captioned 93-250 and 93-255 are granted in part and denied in part. The bankruptcy court's Order of April 16, 1993, is affirmed, except the permanent injunction contained in Section 12.19 of the Plan of Reorganization is hereby vacated.

11/29/95

/s/ Joseph J. Longobardi
Joseph J. Longobardi, D.J.

## APPENDIX G

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

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| In re: | ) | |
| CONTINENTAL AIRLINES, | ) | Case Nos. 90-932 |
| INC., *et al.*, | ) | through 90-984 |
| | ) | |
| Debtors. | ) | |
| | ) | |

FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER CONFIRMING THE DEBTORS' REVISED SECOND AMENDED JOINT PLAN OF REORGANIZATION, AS MODIFIED, UNDER CHAPTER 11 OF THE UNITED STATES BANKRUPTCY CODE AND GRANTING RELATED RELIEF

Continental Airlines, Inc. ("CAL"), Continental Airlines Holdings, Inc. ("CTA") and the affiliated debtors and debtors-in-possession in these jointly-administered Chapter 11 cases (collectively, the "Debtors"), having filed with the Court the Debtors' Revised Second Amended Joint Plan of Reorganization under Chapter 11 of the United States Bankruptcy Code, dated January 13, 1993, and having modified such Plan by Modifications filed with the Court on March 12, 1993, April 9, 1993, and on April 16, 1993 (as so modified, the "Plan"; capitalized terms used in this Order and not otherwise defined shall have the respective meanings ascribed to such terms in the Plan); and the Debtors' Revised Third Amended Disclosure Statement, dated January 13, 1993 (the "Disclosure Statement"), having been filed with and approved by the Court pursuant to an order dated January 8, 1993 (the "Disclosure Statement Order") as containing "adequate information" pursuant to section 1125 of title 11, United States Code (the "Bankruptcy Code"); and copies of (a) the

Plan, (b) the Disclosure Statement, (c) a letter of the Official Committee of Unsecured Creditors in a form approved by the Court, and (d) the appropriate ballot(s) (for those Creditors entitled to vote on the Plan), having been transmitted to all Creditors entitled to receive the same pursuant to the Disclosure Statement Order, the United States Trustee, counsel for the Official Committee of Unsecured Creditors and the Official Committee of Equity Security Holders, all indenture trustees and those parties who have filed notices of appearance in the Debtors' Chapter 11 cases pursuant to Bankruptcy Rule 2002, the Securities and Exchange Commission, the District Director of Internal Revenue for the district in which these Chapter 11 cases are pending, and the United States Attorney for the District of Delaware, all in accordance with the Disclosure Statement Order; and the Disclosure Statement Order having fixed (a) on or before 4:00 p.m. Eastern Standard Time, on February 16, 1993 or, if the Disclosure Statement and related solicitation materials were mailed to a Creditor after January 19, 1993, with respect to such Creditor, the 28th day after they are so mailed, as the last date and time by which all Ballots must be properly completed, executed, marked and received by the Debtors at one of the addresses specified for that purpose in the Disclosure Statement and in the Published Notice described in the Disclosure Statement Order, in order to be considered as acceptances or rejections of the Plan; and (b) February 23, 1993 (which date was thereafter continued to March 16, 1993, by order of the Court), at 9:30 a.m., as the time and date for the hearing pursuant to sections 1128 and 1129 of the Bankruptcy Code (the "Confirmation Hearing") to consider confirmation of the Plan and any objections thereto including, without limitation, any objection to the

Disclosure Statement dealing with a confirmation issue (the "Objections"); and due notice of the Confirmation Hearing and the date by which Objections must be filed having been given and published in accordance with the terms of the Disclosure Statement Order; and due notice of the continuance of the Confirmation Hearing to March 16, 1993, having been given; and the Court having ruled at the Disclosure Statement Hearing that consideration of objections to the Disclosure Statement dealing with a confirmation issue would be deferred until the Confirmation Hearing without the need for refiling; and the Confirmation Hearing having been held before the Court beginning on March 16, 1993 and continuing thereafter on March 17, 18, 19, 25, 26 and 30, 1993 and April 7 and 16, 1993; and the appearance of all interested parties having been noted on the record; and the Court having considered all objections to confirmation of the Plan and to this Order; and upon all the record and the evidence adduced at the Confirmation Hearing (including testimony and exhibits admitted into evidence) and upon the Debtors' Memorandum in Support of Confirmation of the Plan, and upon the Affidavits submitted in support of confirmation of the Plan and upon the submissions, including affidavits and offers of proof, at the Confirmation Hearing, the arguments and representations of counsel, and all pleadings and proceedings had herein, the Court makes the following Findings of Fact and Conclusions of law setting forth the reasons for the Court's issuance of this Order confirming the Plan, overruling the outstanding Objections, and granting the other relief provided for herein:

THE COURT HEREBY FINDS THAT:

1. On December 3, 1990 (the "Petition Date") the Debtors filed petitions for relief under Chapter 11 of the Bankruptcy Code.

2. Since the Petition Date, the Debtors have continued to operate their businesses as debtors-in-possession pursuant to sections 1107 and 1108 of the Bankruptcy Code.

3. (a) Commencing in the Spring of 1992, the Debtors solicited many potential investors to provide funding for a plan of reorganization for the Debtors. Keane Tr. 375-76; Exhibit 18.[1] As a result of active bidding among several potential investors, on October 14, 1992, the Court, at the Debtors' request, issued an order (the "Final Bidding Procedures Order"), which, among other things, set November 2, 1992, as the deadline for submission of additional or revised bids to invest in the Debtors and authorized the Debtors to enter into an agreement, subject to confirmation of a plan of reorganization, with the investor or investor group submitting the highest and best bid. Pursuant to the Final Bidding Procedures Order, the Debtors issued detailed bidding procedures that were followed by the Debtors and the bidding parties. The bidding was done in an arm's length fashion and in a good faith effort to obtain the highest and best offer.

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[1] Court's citations to exhibits admitted into evidence are designated by exhibit numbers, and unless otherwise designated, are to exhibits admitted on the Debtors' motion. Citations to the transcript of the Confirmation Hearing are designated as follows: "[name of witness] Tr. [page]."

(b) On November 2, 1992, the Debtors received offers only from Air Partners ("AP") and Air Canada ("AC", and together with AP, the "Investors") and from a group including MAXAIR Holdings, Inc. On November 6, 1992, the boards of directors of CTA and CAL, met with representatives from AP and AC and the MAXAIR Holdings, Inc., group. Based on the value offered under each of the proposals and all the other information and facts available to the boards of directors regarding each of the proposals, including the benefits to the Debtors' Creditors, financial details, ability of the proponents to obtain the requisite financing, synergistic and similar benefits to being affiliated with another airline, and an analysis from their investment advisors, Smith Barney, Harris Upham & Co. ("Smith Barney"), the boards unanimously decided that the offer from AP and AC was the better offer and should be accepted in the best interests of the Debtors and their estates. Pursuant to the Final Bidding Procedures Order, the Debtors notified the Court on November 9, 1992 of their selection of the offer from AP and AC as the better offer. The transactions provided for by the offer from AP and AC are herein referred to as the "Financing Transaction."

(c) On November 9, 1992, CAL, and CTA, on behalf of the Debtors, entered into an Investment Agreement (the "November Investment Agreement") with AP and AC, providing for the Financing Transaction, including the purchase by AP and AC or their respective assignees on the Effective Date of securities of NewCal and its subsidiary, Continental Micronesia; for $450,000,000 in cash, less investment banking fees and certain other fees.

(d) On November 9, 1992, CAL and CTA, on behalf of the Debtors, entered into an Interim Procedures

Agreement with AP and AC, and the Court approved such Interim Procedures Agreement by Order dated November 24, 1992 (the "Interim Procedures Approval Order").

(e) On November 16, 1992, the Debtors filed with the Court an amended disclosure statement and an amended plan of reorganization based on the Financing Transaction.

4. On January 8, 1993, the Court approved the Debtors' Third Amended Disclosure Statement, including certain matters referred to on the record of the hearing on the adequacy of such Disclosure Statement, which matters were then reflected in the Disclosure Statement as subsequently filed with the Court and distributed to Creditors. Following entry of the Disclosure Statement Order and in accordance therewith, the Debtors distributed copies of the Disclosure Statement and Ballots to all known Creditors entitled to vote thereon, sent a notice in a form approved by the Court to known holders of Subordinated Claims and and Equity Interests, sent a notice in a form approved by the Court to known holders of claims that are not impaired pursuant to section 1124 of the Bankruptcy Code (which notice dealt only with the non-impairment of, and the treatment under the Plan of, certain classes and categories of Claims, but did not deal with the allowance or disallowance of any specific claims), gave notice and caused publication of a notice of the Confirmation Hearing, the last date to file Ballots for accepting or rejecting the Plan, and to file Objections to the Plan, all as provided in said Order. The due, proper and timely taking of the foregoing actions are evidenced by the Affidavits of Madeleine de Sousa and Gerald J. Mucha, presented and admitted into evidence at the Confirmation

Hearing as Exhibits 32 and 33, and by the testimony of Madeleine de Sousa at such hearing.

5. On or about January 13, 1993, CAL, and CTA, on behalf of the Debtors, and AP and AC, entered into an Amendment to Investment Agreement and to Interim Procedures Agreement. The November Investment Agreement, as amended thereby, is referred to in this Order as the "Investment Agreement". The Investment Agreement contemplates, among other things, the issuance by Continental Micronesia of the Series A Notes and the issuance by NewCal of the Series B Notes, each as defined in the Investment Agreement. The Debtors (a) after lengthy negotiations, entered into a commitment agreement pursuant to which General Electric Capital Corporation ("GE Capital") agreed to purchase (or arrange for its affiliated designees or assigns to purchase) in a single transaction Series A Notes in the aggregate principal amount of $160 million, subject to the terms and conditions set forth in the commitment agreement and in the documentation to be prepared pursuant thereto (the "Series A Note Commitment Agreements"); and (b) are negotiating to enter into a commitment agreement pursuant to which Air Canada or its designee will agree to purchase in a single transaction Series B Notes in the aggregate principal amount of $150 million, subject to terms and conditions to be set forth in such commitment agreement and in the documentation to by prepared pursuant thereto (the Series A Commitment Agreement and the agreements and documents necessary or appropriate to implement the issuance and sale of the Series B Notes are collectively referred to as the "Plan Debt Financing"). In negotiating the Plan Debt Financing, and in preparing to sell or purchase the Series A Notes

and Series B Notes, the parties thereto have negotiated at arms' length and acted in good faith. The Debtors' entry into Plan Debt Financing is in the best interest of the Debtors, their respective bankruptcy estates, and their creditors.

6. On January 15, 1993, the Debtors filed their Revised Third Amended Disclosure Statement and Revised Second Amended Joint Plan of Reorganization with the Court.

7. On March 12, 1993, the Debtors filed a Modification of such Plan (the "First Modification") reflecting certain technical changes to the terms thereof, including the settlement of a number of Objections to the Plan. Exhibit 28. On April 9, 1993, and on April 16, 1993, the Debtors filed further Modifications reflecting certain further technical changes (the "Second Modification" and the "Third Modification," respectively, and together with the First Modification, the "Modifications").

8. As set forth in the Affidavit of Ms. Madeleine de Sousa respecting the Ballots on the Plan (the "Ballot Affidavit"), filed March 25, 1993, all impaired classes have accepted the Plan in terms of both number and amount pursuant to section 1126 of the Bankruptcy Code, except for Secured Classes 9.16, 9.46, 9.48 and 9.49[2], which have

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[2] A number of other Secured Classes originally rejected the Plan. Pursuant to various Stipulations that were approved and "so ordered" by the Court during the Confirmation Hearing, and pursuant to Bankruptcy Rule 3018(a), this Court, for good cause shown, permitted the Secured Creditors in such Classes to change their votes to acceptance of the Plan, such Secured Creditors so changed their votes, and such Classes are therefore deemed to have accepted the Plan as modified pursuant to such Stipulations.

not accepted the Plan, and Classes 17 (consisting of Subordinated Claims) and 18 (consisting of Equity Interests), which will receive no distributions under the Plan and are therefore deemed to have rejected the Plan pursuant to section 1126(g) of the Bankruptcy Code. Accordingly, the Plan satisfies section 1129(a)(8) of the Bankruptcy Code with respect to all impaired classes other than Secured Classes 9.16, 9.46, 9.48 and 9.49, and Classes 17 and 18.

9. The Plan complies with the applicable provisions of the Bankruptcy Code as required by section 1129(a)(1) thereof.

10. The Debtors, as proponents of the Plan, have complied with the applicable provisions of the Bankruptcy Code as required by section 1129(a)(2) thereof.

11. The Plan has been proposed in good faith and not by any means forbidden by law as required by section 1129(a)(3) of the Bankruptcy Code.

12. In bidding and in negotiating the Investment Agreement and the Related Agreements (as defined in the Investment Agreement) and in preparing to purchase the NewCal Common Stock, NewCal Warrants and NewCal Preferred Stock to be issued by NewCal pursuant to the Plan and such Agreements, AP and AC have acted in good faith and have complied with the procedures established by the Court, and AC has acted in good faith in arranging for the purchase of the Series B Notes.

13. Any payment made or to be made by the Debtors, or by a person issuing securities or acquiring property under the Plan, for services or for costs and expenses in or in connection with these Chapter 11 cases, or in connection

with the Plan and incident to these Chapter 11 cases, shall be subject to the approval of the Court as reasonable as required by section 1129(a)(4) of the Bankruptcy Code.

14. At the Confirmation Hearing or in the Disclosure Statement, the Debtors have disclosed the identity and affiliations of the individuals proposed to serve, after the Effective Date of the Plan, as directors and officers of NewCal, the NewCal Subs, and Continental Micronesia, Inc. Exhibits 46 and 47. The continuance or appointment of such individuals as directors and to such offices is consistent with the interests of Creditors and Equity Interest Holders and with public policy, and the Debtors have disclosed the identity of any insider that will be employed or retained by NewCal or any NewCal Sub, and the nature of any compensation for such insider, all as required by section 1129(a)(5) of the Bankruptcy Code. Exhibit 46.

15. The Plan does not provide for any rate changes requiring the approval of a governmental regulatory commission, as contemplated by section 1129(a)(6) of the Bankruptcy Code.

16. The Plan has not been accepted by each holder of a Claim or Equity Interest of every class that is impaired under the Plan; however, each non-accepting holder of a Claim or Equity Interest of each such class (other than Secured Class 9.39) will receive or retain under the Plan on account of such Claim or Equity Interest property of a value, as of the Effective Date, that is not less than the amount that such holder would so receive or retain if each Debtor were liquidated under Chapter 7 of the Bankruptcy Code on such date as required by section 1129(a)(7)(A) thereof. In making the foregoing findings, the Court finds

credible the testimony of Brian Keane, which evidence establishes to the satisfaction of the Court that:

> (i) in a hypothetical Chapter 7 liquidation, as required by section 1129(a)(7) of the Bankruptcy Code (in which, by its terms, the PBGC Settlement would not apply), General Unsecured Claims would receive no recovery at all after payment of all Secured Claims and Claims of higher priority, regardless of whether such hypothetical liquidation were conducted separately for the estates of each of the 53 Debtors, for the Debtors grouped together in the four pools proposed by the Plan or for all of the Debtors substantively consolidated together into one pool; and
>
> (ii) Each holder of a Secured Claim (other than a Secured Claim in Secured Class 9.39) or a Frontier I Trust Claim which has not accepted the Plan will receive or retain under the Plan on account of such Claim property of a value, as of the Effective Date, that is not less than the amount such holder would so receive in a hypothetical Chapter 7 liquidation, as required by section 1129(a)(7) of the Bankruptcy Code, under any of the foregoing scenarios.

17. Secured Class 9.39 is the only class that has made a valid election under section 1111(b)(2) of the Bankruptcy Code. Keane Tr. 441-42. Each holder of a Claim in Secured Class 9.39 will receive or retain under the Plan on account of such Claim properly of a value, as of the Effective Date, that is not less than the value of such holder's interest in the Debtors' estates' interest in the property that secures such Claim, as required by section 1129(a)(7)(B) of the Bankruptcy Code. Keane Tr. 442-43.

18. In arriving at these conclusions, Keane made detailed liquidation studies for all 53 Debtors, for the Debtors grouped together in the four pools proposed by the Plan and for one substantively consolidated estate for all Debtors. Keane Tr. 253; Exhibits 10, 11, 12, 13, and 34.

19. Keane's testimony was credible and essentially uncontested. Keane employed a reasonable methodology based upon reasonable assumptions. Keane Tr. 258-60. He made reasonable assumptions regarding the liquidation value of assets, basing liquidation values for aircraft on testimony used in prior proceedings in this Court (Keane Tr. 258-60) and values for other assets on appraisals where they were available. Keane Tr. 260. He then made reasonable adjustments to book and market values to determine liquidation values. He made reasonable assumptions about the value of intercompany claims (Rowen Tr. 936), including, among other things, the intercompany note payable by CAL to CTA (with an outstanding balance, including post-petition interest, of approximately $106 million) for which CTA claims security (the "Intercompany Secured Note") and various service arrangements between CTA, and its affiliates, and CAL. (the "Intercompany Service Arrangements"). Keane Tr. 258-70. There is substantial, credible, uncontested evidence that the payments made in connection with these Intercompany Service Arrangements during these cases have amounted to at least the fair value of the goods and services provided under these contracts and that if the contracts were rejected in a liquidiatoin, CTA would not have any administrative claims arising from the rejection. Keane Tr. 261-63. There is substantial, credible, uncontested evidence that CAL has substantial preference and equitable subordination defenses to payment on the

Intercompany Secured Note. Keane Tr. 267-77; Rowen Tr. 927-32.

20. Testimony by Janice Bryant, formerly Controller of CTA, credibly described facts providing the bases for these defenses. Testimony of Robert Rowen, CAL Deputy General Counsel, described credibly, in greater detail, the legal basis for these preference and equitable subordination defenses and the substantive consolidation of various estates.

21. Keane also made reasonable assumptions about claims against the various Debtors, based on information from CAL personnel responsible for claims administration, the CAL legal department and outside pension counsel. Based on these sources, Keane made a reasonable assumption that there would be approximately a $650 million joint and several unsecured claim by the PBGC against each of the Debtors in a Chapter 7 liquidation related to the Eastern Air Lines pension plans (Keane Tr. 282) and an approximately $78.6 million joint and several priority claim against each of the Debtors arising out of the termination of the CAL pension plan in a liquidation. Keane Tr. 283-84; Exhibits 10 and 34.

22. There is substantial, credible and uncontested evidence that in a hypothetical Chapter 7 liquidation of CTA alone there would be a deficit of approximately $69.7 million before any value would be available to its unsecured creditors (Keane Tr. 257; Exhibit 10) and in a hypothetical liquidation of the CTA pool there would be a deficit of $78.5 million before any value would be available to CTA's unsecured creditors. Keane Tr. 308; Exhibit 13.

23. Except to the extent that the holder of a particular Claire has agreed to a different treatment of

such Claim (including, without limitation, such agreements relating to certain deferrals of rent and certain claims incurred in the ordinary course of the Debtors' businesses), the Plan provides, as required by section 1129(a)(9) of the Bankruptcy Code, that –

> (A) with respect to an Allowed Claim of a kind specified in section 507(a)(1) of the Bankruptcy Code (i.e., Allowed Administrative Claims, including Allowed Superpriority Claims), on the Effective Date, the holder of such Claim will receive on account of such Claim Cash equal to the Allowed amount of such Claim as required by section 1129(a)(9)(A) of the Bankruptcy Code;
>
> (B) with respect to an Allowed Claim of a kind specified in section 507(a)(3) or 507(a)(4) of the Bankruptcy Code (i.e., Priority Wage Claims and Priority Plan Contribution Claims), the holder of such Claim will receive Cash on the Effective Date equal to the Allowed amount of such Claim as required by section 1129(a)(9)(B) of the Bankruptcy Code; and
>
> (C) with respect to an Allowed Claim of a kind specified in section 507(a)(7) of the Bankruptcy Code (i.e., Priority Tax Claims) the holder of such Claim will receive on account of such Claim deferred Cash payments, over a period not exceeding six years after the date of assessment of such Claim, of a value, as of the Effective Date, equal to the Allowed amount of such Claim as required by section 1129(a)(9)(C) of the Bankruptcy Code.

Section 10.1(ii) of the Plan provides for the payment of any claim of a kind specified in sections 507(a)(1), 507(a)(3), 507(a)(4) and 507(a)(7) of the Bankruptcy Code, but which

has not been Allowed as of the Effective Date of the Plan, on the fifth Business Day after such Claim is Allowed, or as soon thereafter as practicable. The Court finds this provision to be an appropriate means of providing for the payment of Disputed or contingent Claims asserting such priority and which have not been determined as of the Effective Date.

24. There do not exist any Claims against the Debtors of a kind specified in sections 507(a)(5) or 507(a)(6) of the Bankruptcy Code, and section 507(a)(2) of the Bankruptcy Code is not applicable in these cases.

25. The overwhelming majority of classes of impaired Secured Claims, and all classes of General Unsecured Claims and Frontier I Trust Claims, have accepted the Plan, and the Court therefore funds that at least one impaired Class of Claims has accepted the Plan, which acceptance has been determined without including any acceptance of the Plan by any insider holding a Claim of such class, as required by section 1129(a)(10) of the Bankruptcy Code.

26. The Debtors have presented substantial and credible evidence as to the Plan's feasibility. After the extinguishment and restructuring of debt under the Plan, NewCal will have shareholder equity of approximately $610 million and cash balances of approximately $635 million as of the Effective Date. Keane Tr. 148-49; Exhibit 1 and 4. There are substantial reasons to believe that NewCal will survive in the market place. NewCal has highly productive employees and substantial cost advantages over its competitors. Keane Tr. 185; Exhibit 6 and 8. During the last year, CAL's results of operations were the second best in the domestic airline industry.

Keane Tr. 189-90; Exhibit 7. CAL's yields have been below industry average (Keane Tr. 200-01) but there is reason to believe they will improve once CAL is reorganized as NewCal. Keane Tr. 201-03.

27. NewCal will have capitalization ratios measuring debt and equity within the range of other competitive airlines. Exhibit 4. NewCal will have a schedule of fixed obligations which is reduced substantially from the Debtors' pre-petition levels. Keane Tr. 154; Exhibit 2. These fixed obligations are spread reasonably over time in the post-confirmation period and there is strong mason to believe that NewCal will be able to meet them as they come due. Keane Tr. 178.

28. Finally, NewCal will have liquidity which is competitive with other major domestic airlines when measured against revenues. Keane Tr. 163-64; Exhibit 3.

29. The Financing Transaction is crucial to the feasibility of the Plan. Over half of the approximately $635 million in cash (Keane Tr. 149) which NewCal will have at the Effective Date will come from the Financing Transaction which ensures that NewCal will have adequate liquidity.

30. The Investors have relied upon the existing cost-structure of CAL and its affiliates, including their highly productive workforce, in entering into the Investment Agreement. There is reason to believe that the Investors will close the Financing Transaction if a satisfactory order is entered confirming the Plan.

31. The Investment Agreement contains a number of conditions to closing based on various factors, including the level of administrative claims payable at the Effective

Date, the level of obligations assumed on the balance sheet of NewCal, and the entry of an order providing that certain former employees of Eastern Air Lines, Inc. ("Eastern") are not entitled to specific performance or other injunctive, equitable, or other prospective relief against the Debtors or NewCal. Among other things, the Investment Agreement provides that the Investors' obligations are subject to the payments and obligations referred to in the preceding sentence being no higher than certain amounts specified in the Investment Agreement. Excluding (i) the "Eastern Claims," as defined in Section 1.91 of the Plan,[3] and (ii) the claims of NationsBank of Tennessee, as Successor Collateral Trustee, for $117,000,000 of alleged post-petition decline to its collateral value (assuming a half-life maintenance condition) ("Market Decline"), there is substantial, credible and uncontested evidence that permits this Court to find, for purposes of determining feasibility, that Administrative Claims payable at confirmation will be within the limits set by the Investment Agreement. Exhibit 9, p.1 lines B2 and K.

32. In order to satisfy certain conditions to the obligations of the Investors, the Debtors have asked this Court (i) to adjudicate the priority of the Eastern Claims and the extent to which, if any, the claimants thereon are entitled to specific performance or other injunctive, equitable and or other prospective relief, which Eastern

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[3] *Provided, however*, that the term "Eastern Claims," as used in this Order, does not include any of the claims of Eastern's Chapter 11 estate (asserted on behalf of that estate by Eastern's Chapter 11 trustee and certain assignees) covered by the Eastern Settlement referred to in the Plan. *See* Plan §§ 1.92, 12.17.

Claims include, *inter* alia, claims based upon the following matters:

a. *In the Matter of an Application of the Air Line Pilots Association International for an Arbitration Under the Labor Protective Provisions Involving Eastern Air Lines, Inc.*, Kasher, Arb. ("LPP Claims");

b. *Hastings-Murtagh, et al. v. Texas Air Corp., et al.*, Case no. 86-2378-CIV-KING (S.D. Fla.);

c. *Air Line Pilots Ass'n and Copeland v. Texas Air Corp., et al.*, Case No. 88-0804-CTV-HOEVELER (S.D. Fla);

d. *Air Line Pilots Ass'n and Copeland v. Texas Air Corp., et al.*, Adv. Pro. No. 89-5692A (Bankr. S.D.N.Y.);

e. *Gioia and Copeland v. Texas Air Corp., et al.*, C.A. No. 9500 (Del. Ch. Ct.), *removed*, No. 89-71. (Banker. D. Del.);

f. *Vaughn, et al. v. Continental Airlines Holdings. Inc., et al.*, Adv. Pro. No. A-92-142. (Bankr. D. Del.);

g. *Tristani, et al. v. Texas Air Corp., et al.*, C.A. No. 1:90-CV-318-JTC (N.D. Ga.); and

h. Miscellaneous claims for wages, sick leave, etc. by employees of Eastern and other third party claims based upon contractual relations with Eastern;

*see* Exhibit 35,[4] and (ii) to adjudicate the amount of NationsBank's Market Decline Claims, if any. These

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[4] As stated *supra* at n.3, to the extent such claims are property of Eastern's estate (*see* Exhibit 35, Tab E) paragraphs 30 through 33 of this Order do not address or otherwise affect those claims.

adjudications are crucial to the willingness of the Investors to consummate the Financing Transaction.

33. As to the Eastern Claims, the Court finds as follows:

A. Based on the March 25, 1993 Stipulation of the Air Line Pilots Association, International and the other parties asserting LPP Claims, as well as this Court's inherent power and discretion to follow its earlier rulings, this Court relies upon, bases its conclusions upon, and incorporates into this Order its two earlier orders dated February 11, 1993 (Appendix A hereto, incorporated herein by this reference). The Court also incorporates herein its Order executed contemporaneously herewith providing that the February 11, 1993 orders should be applied to the LPP Claims subject to the Debtors' Second Partial Objection to LPP Claims, filed on January 29, 1993 (Appendix B hereto, incorporated herein by this reference). Accordingly, this Court finds and concludes that no party has any administrative or other priority claim for any LPP Claim or any right to specific performance or other injunctive, equitable, or other prospective relief with respect to any LPP Claim; and

B. As to the other Eastern Claims, as described in Paragraph 31 and 32 above, the Court finds, based upon the evidence of record, including Exhibit 35, that all such Eastern Claims are, at best, general unsecured prerepetition claims. The Court further finds that if the Eastern Claims are ultimately found to be valid, such claims would give rise to a right to payment, and, therefore, such Eastern Claims are dischargeable, and are not entitled to administrative priority, and are not entitled to

specific performance or other injunctive, equitable or other prospective relief. *See* Plan at § 12.16.

34. With respect to NationsBank's claim for alleged Market Decline, this matter has been fully tried and briefed and the record of that trial has been incorporated into the record of the Confirmation Hearing by order of this Court. Based on careful analysis of the facts and applicable law, which are elaborated more fully in (appendix C hereto, incorporated herein by this reference), this Court finds and concludes that NationsBank has a claim of $___ for Market Decline.

35. There is substantial, credible and uncontested evidence that the Debtors have satisfied, or are close to satisfying, the various other conditions set forth in the Investment Agreement, and therefore there is a substantial basis to believe the Financing Transaction will be consummated.

36. The Debtors' most recent projections show that, with the substantial liquidity provided by the Financing Transaction, NewCal and its affiliates will be able to meet their fixed obligations under the Plan and have adequate liquidity to provide assurance of performance in the future.

37. The evidence shows that the Debtors will be able to satisfy the full amount of all Allowed Claims required by the Plan to be satisfied in the manner and at the times as provided for under the Plan. After consummation of the Plan, NewCal and the NewCal Subs will have sufficient assets and equity generated from their operations to satisfy fully all of their debts as they become due.

38. It appears that in light of the findings set forth in paragraphs 33 and 34 above, NewCal and the NewCal Subs will be able to satisfy in the manner provided by the Plan all Allowed Administrative Claims, as well as any Disputed Administrative Claims that are ultimately Allowed, as required by section 1129(a)(9)(a) of the Bankruptcy Code and by the Plan. Accordingly, based on those findings, the Court further finds that the Debtors should not be required to deposit in a segregated account any amounts that may be required to pay Administrative Claims that may be Allowed after the confirmation of the Plan.

39. The testimony of John Luth also discloses the potential purchase by NewCal from The Boeing Company and/or one or more other airframe manufacturers (together with related purchases of power plants from one or more power plant manufacturers) of new firm and option jet aircraft commencing in early 1994 for an aggregate purchase consideration, in the case of the firm aircraft, of approximately $4.0 billion pursuant to one or more purchase agreements which may be entered into, subject to certain conditions, including the effectiveness of the Plan, on or before the Effective Date (the "New Aircraft Agreements"). The Debtors have established that such an aircraft acquisition program is financially feasible and is important to the continued growth and operational plan of NewCal.

40. In view of the foregoing, the Court finds that the Plan is feasible and that confirmation and consummation of the Plan is not likely to be followed by the liquidation, or the need for further financial reorganization of, NewCal or any NewCal Sub, all as required by section 1129(a)(11)

of the Bankruptcy Code, assuming consummation of the Financing Transaction.

41. All fees payable under 28 U.S.C. § 1930 have been paid, or the Plan provides for the payment of all such fees on the Effective Date as required by section 1129(a)(12) of the Bankruptcy Code.

42. Section 14.9 of the Plan provides for the continuation after the Effective Date of payment of all Retiree Benefits at the levels established pursuant to subsection (e)(1)(B) or (g) of section 1114 of the Bankruptcy Code, at any time prior to the Confirmation Date, for the duration of any period (if any) the Debtors have obligated themselves to provide such Retiree Benefits at such levels, as required by section 1129(a)(13) of the Bankruptcy Code. The Debtors have represented and advised the Court that they have not obligated themselves to continue any such Retiree Benefits.

43. The Plan does not discriminate unfairly, and is fair and equitable, with respect to each class of Claims or Equity Interests that is impaired under, and has not accepted, the Plan, as required by section 1129(b)(1) of the Bankruptcy Code.

44. Secured Classes 9.48 and 9.49, each of which is to be treated by Restructuring Treatment under the Plan, are impaired under, and have not accepted, the Plan. As to each such class, the Plan provides that, and there is substantial and credible evidence that, the holders of Claims in such class shall retain the liens securing such Claims to the extent of the Allowed amount of such Claims, that the property subject to such liens shall be retained by NewCal, and that each such holder shall receive on account of such Claim deferred Cash payments

totaling at least the Allowed amount of such claims, of a value, as of the Effective Date, of at least the value of such holder's interest in the Debtors' estates' interest in such property. Keane Tr. 439, 443, 781. Such treatment satisfies the requirements of section 1129(b)(2)(A)(i) of the Bankruptcy Code.

45. Secured Class 9.16 is impaired under, and has not accepted, the Plan. There is substantial, credible, and uncontested evidence that the holders of Claims in such class shall receive treatment under the Plan that is consistent with, and that satisfies the requirements of, section 1129(b)(2)(A)(i) or (iii) of the Bankruptcy Code.

46. Secured Class 9.46, which is to be treated by Temporary Retention under the Plan, is impaired under, and has not accepted, the Plan. As to such class, the Plan provides that the holders of Claims in such class shall receive the indubitable equivalent of such Claims in that NewCal will temporarily retain the collateral securing such claims and will abandon such collateral to the holders of such Claims over specified periods ending not later than April 1994, as set forth in Schedule 6 to the Plan. The Collateral will be abandoned in a net condition comparable to the condition of such collateral on the Effective Date, or NewCal will pay the net costs of restoring the collateral to such condition as provided in Schedule 6 to the Plan. Such holders will retain their lien on such collateral and receive commercially reasonable documentation thereof. NewCal will pay such amounts with respect to its use of such collateral after the Effective Date as specified in Schedule 6 to the Plan. Assuming a hypothetical sale of the collateral for Secured Class 9.46 at the Effective Date, these payments provide compensation which is approximately double the rate of interest which

would be appropriate on a secured loan, of the proceeds of such hypothetical sale of a duration equal to the period of Temporary Retention. Exhibit 29. This provides adequate compensation for the risk imposed on the holders during the Temporary Retention period, including any compensation appropriate for the risk of decline in the value of the collateral during the period of Temporary Retention. Keane Tr. 483. For all of these reasons, such treatment satisfies the requirements of section 1129(b)(2)(A)(iii) of the Bankruptcy Code.

47. Holders of Subordinated Claims in Class 17 will not receive or retain any property under the Plan on account of such Subordinated Claims and are deemed to have rejected the Plan. Such holders would not receive or retain any property on account of such Subordinated Claims if the applicable Debtor were liquidated under Chapter 7 of the Bankruptcy Code on the Effective Date (under any of the three possible hypothetical liquidation scenarios described above) because there would be insufficient value available in such a liquidation to satisfy all Claims which are senior in right of payment to such Subordinated Claims.

48. Holders of Equity Interests in Class 18 will not receive or retain any property under the Plan on account of such Equity Interest and are deemed to have rejected the Plan. Such holders would not receive or retain any property on account of such Equity Interests if each Debtor were liquidated under Chapter 7 of the Bankruptcy Code on the Effective Date, under any of the three possible hypothetical liquidation scenarios described above.

49. There is no class of Claims or Equity Interest junior to Class 18.

50. With respect to all classes of General Unsecured Claims and with respect to Class 17, the Plan provides that the holder of any Claim or Equity Interest that is junior to the Claims in such classes will not receive or retain under the Plan, on account of such junior Claim or Equity Interest, any property.

51. The Debtors have established by substantial, credible and uncontested evidence that no NewCal Common Stock or any interest therein will be issued on the Effective Date to any person other than (i) AP and AC (or their designees), pursuant to the Investment Agreement, (ii) the Distribution Agent, for the benefit of holders of Allowed General Unsecured Claims pursuant to the Plan, and (iii) the Continental Airlines Retirement Plan, pursuant to the PBGC Settlement and the Plan. Keane Tr. 316-17. There are no understandings regarding the issuance of NewCal Common Stock in the future to any other person and specifically, to any member of the Debtors' management. The Disclosure Statement had earlier reflected that there could possibly be some NewCal Common Stock issued on the Effective Date, other than the shares specifically allocated pursuant to the Investment Agreement. All of the Investors, the Unsecured Creditors Committee and the Debtors believed that this unallocated stock would be an asset of NewCal, available to be disposed of by NewCal for legitimate corporate purposes, including to discharge or settle administrative claims or liabilities of NewCal and obtain assets or services for NewCal.

52. The Plan provides the same treatment for each Claim of a particular class unless the holder of a particular Claim agrees to a less favorable treatment of such particular Claim.

53. Each class of General Unsecured Claims (i.e., Classes 13, 14, 15 and 16) has accepted the Plan in terms of both number and amount. Classes 15 and 16 have voted to make the Cash Election applicable to such classes and Classes 13 and 14 have not voted to make such Cash Election and will therefore receive their respective Pro Rata Share of Additional NewCal Common Stock as provided by the Plan. Exhibits 31, 32, 33.

54. The Plan provides that Classes 13, 14, 15 and 16 shall receive 44.1%, 20.6%, 3.0% and 32.3%, respectively, of the Creditors' NewCal Stock and, subject to the effect of the Cash Election, all other consideration distributed to General Unsecured Creditors.

55. The settlements reflected and set forth in Article 2, Section 2.1 of the Plan (the "Article 2 Provisions") providing for the pooling of the assets and liabilities of certain of the Debtors' estates, establishing four separate Classes of General Unsecured Claims, and allocating the Creditors' NewCal Stock and other consideration among those four classes, as set forth above, are reasonable, fair, equitable, and non-discriminatory, in light of all the evidence presented, including, without limitation, evidence with respect to (i) the enterprise values contributed by the CAL Debtors, the Commuter Debtors, and the System One Debtors, (ii) the various intercompany Claims that certain Debtors could assert against other Debtors and the defenses that could be asserted against such Claims, (iii) CAL's likelihood of success in disallowing, subordinating or offsetting the various claims that CTA could assert against CAL, (iv) the relative net values of the various Debtors' estates, the probability of success on the merits of claims that the various estates and Claims against such Debtors should be substantively consolidated, and the

defenses that could have been asserted to substantive consolidation, (v) the substantial delay and expense that the various estates would incur were these issues not settled, (vi) the limited value available for distribution to General Unsecured Claims, (vii) the further harm that the Debtors' estates would suffer were the Plan not confirmed, and (viii) the strong public interest in the rehabilitation of the Debtors.

56. All the serious potential investors were interested in investing in the Debtors as a consolidated enterprise. All these investors contemplated a structure such as the one provided by the Plan in which they would invest in NewCal with all the assets of the various affiliated Debtors either owned by NewCal or by a subsidiary of NewCal. Keane Tr. 318. The investors would receive in part common stock for their investment with the remaining common stock to be allocated to General Unsecured Claims. Keane Tr. 316. Such a structure requires some method for allocating common stock among the various General Unsecured Claims.

57. The limited substantive consolidation employed to create four pools under the Plan and to allocate the Creditors' NewCal Stock and other consideration among those four pools is reasonable, fair and equitable. Keane Tr. 332, 339, 344. The assignment of each of the Debtors to a specified pool is logical in light of the nature of their respective businesses. The CAL Debtors are completely integrated and perform the same service. Keane Tr. 312. The Commuter Debtors operate as one under the name Continental Express and report on a consolidated financial basis. Keane Tr. 313. The System One Debtors operate together. Keane Tr. 313. The CTA Debtors all provide services for and collect fees from Continental and System

One. Keane Tr. 314. Condensing from 53 separate Debtors to four pools of Debtors greatly simplified the value allocation process. Keane Tr. 316-17.

58. No unsecured non-priority creditor has objected to being included in a particular pool of unsecured claims except certain holders of CTA Senior Notes and holders of Series D Preferred Stock issued by Eastern who assert claims pursuant to a Subordinated Guarantee of CTA. Those creditors object principally to the allocation of shares of Class A and B Common Stock among Classes 13, 14, 15 and 16. No creditor of Chelsea, TAC Fuel, CML Holdings or the SPC Debtors (the members of the CTA pool other than CTA) has objected to the creation of the pools or the allocation of value. As Keane testified, the holders of claims against CTA are benefitted by being substantively consolidated with the assets and claims of the other CTA Debtors. Keane Tr. 336, 338. Exhibits 10 and 13 show that the ratio of assets to unsecured claims is greater in the CTA pool than for CTA standing alone.

59. The Plan is based upon and incorporates the PBGC Settlement which has been previously approved by the Court. By its terms, the PBGC Settlement is subject to confirmation of a Chapter 11 Plan of reorganization. Subject to Section 12.17 of the Plan, the Plan also incorporates the Eastern Settlement which has previously been approved by the Court. The allocation of the Allowed General Unsecured Claims of the PBGC and Eastern, respectively, contemplated by such settlements and set forth in the Plan is fair and reasonable.

60. Among CTA's principal assets is the Intercompany Secured Note against CAL. Bryant Tr. 899. With accrued interest, CTA would have a claim against CAL on

that note in the amount of $106 million as of March 31, 1993. Rowen Tr. 925.

61. The testimony of Robert Rowen establishes that CAL has numerous defenses to that note and other claims asserted by CTA, and has various affirmative claims against CTA, that these defenses and affirmative claims are substantial, and that CAL would have a reasonable probability of success on the merits. Rowen's testimony also establishes that these claims and defenses would be vigorously prosecuted by CAL's estate and its creditors in a hypothetical liquidation, and that such litigation would be costly and lengthy. First, CAL could assert that the early repayments by CAL of the $150 million unsecured note within one year of the Petition Date were preferential transfers and that the prepayment of that note followed a few months later by a new $85 million secured facility from CTA constituted an avoidable preference pursuant to section 547 of the Bankruptcy Code by permitting CTA to in effect refinance antecedent unsecured debt. Rowen Tr. 927. Avoidance of that note would enable CAL, to fully offset any recovery CTA would have against CAI, before CAL distributed any assets to CTA under the reorganization and would constitute a defense to any claim by CTA pursuant to section 502(d) of the Bankruptcy Code. Rowen Tr. 927. CAL would allege that these transactions were made during the one year preferential payment period for insiders and while CAL was insolvent, enabling CTA to receive more than it would have in a Chapter 7 liquidation of CAL. Rowen Tr. 928-29.

62. Second, CAL would assert that any claim by CTA should be equitably subordinated to a status less than that of a secured claim due to CTA's exercise of control over CAL which benefitted CTA. Rowen Tr. 931.

63. Third, CAL would seek to recover prior payments of management fees to CTA, TAC Fuel fees and Chelsea Catering fees within one year of the Petition Date as fraudulent conveyances. Rowen Tr. 932.

64. Furthermore, the Court finds compelling the testimony of Brian Keane that the settlements of these claims pursuant to the Article 2 Provisions are fair and reasonable from a financial point of view, and that neither AC and AP, nor any of the other potential investors, would be likely to invest in NewCal if the assets of NewCal or the NewCal Subs continued to be subject to such claims.

65. The settlement of such claims pursuant to the Article 2 Provisions is well within the range of reasonable litigation results and in the best interests of the estates of all of the Debtors. The benefits to all creditors and to the CTA creditors of the settlement embodied in the Article 2 Provisions greatly outweigh any harm claimed by the objecting creditors.

66. The so-called Ad Hoc Committee of CTA Bondholders (the "Ogata/Lustig Group") failed to take advantage of formal discovery procedures and to use information timely made available to them. The Ogata/Lustig Group never made a formal discovery request until approximately 4:00 p.m. on March 15, 1993, one day before the Confirmation Hearing was to begin at 9:30 a.m. Exhibit 10A. The Ogata/Lustig Group had previously benefitted from informal discovery which the Debtors would not have made available if the Ogata/Lustig Group had filed a formal discovery request earlier. Exhibit 10A.

67. Additionally, during the first two days of the Confirmation Hearing, when the Debtors introduced evidence relevant to the Ogata/Lustig Group's Objections,

the Debtors made available the underlying materials Keane relied upon in his testimony and Exhibits each day after the hearing. The Ogata/Lustig Group did not inspect any documents after the first day of the hearing, March 16, 1993 but did inspect the documents made available after the second day of the hearing, March 17, 1993. These documents are contained in Exhibit 34, which include those which support Keane's March 17, 1993 testimony concerning liquidation analyses, pooling, and the allocation of Creditors' NewCal Stock and other consideration among the pools. The Ogata/Lustig Group was offered copies of the documents included in Exhibit 34 on the night of March 17, 1993 in time for them to cross-examine Keane on March 18, 1993. The Ogata/Lustig Group chose not to take copies of these documents and did not cross-examine Keane on March 18, 1993.

68. The Plan provides for the amendment to the charter of CAL in the form of the Restated Certificate of Incorporation (the "Restated Certificate") filed as an exhibit to the Second Modification, which Restated Certificate includes provisions prohibiting the issuance of non-voting equity securities as required by section 1123(a)(6) of the Bankruptcy Code and provides, as to the several classes of securities possessing voting power, an appropriate distribution of such power among such classes, including, in the case of any equity securities having a preference over another class of equity securities with respect to dividends, adequate provision for the election of directors representing such preferred class in the event of default in the payment of such dividends.

69. The provisions of the Restated Certificate and the NewCal By-laws prohibiting non-United States citizens from voting NewCal Common Stock held by them,

unless they are listed on the stock register to be maintained by NewCal, which register is limited to 25% of the voting power of common shareholders, are fair, reasonable and are, among other things, intended to ensure that CAL will remain a certificated air carrier under section 401 of the FAA, 49 U.S.C. § 1371, in light of the Financing Transaction, which itself provides funding critical to the effectiveness and feasibility of the Plan. Such provisions do not contravene section 1123(a)(6) of the Bankruptcy Code. After completion of the Financing Transaction, NewCal will remain such a certificated air carrier.

70. It appears that the Debtors will satisfy each and every condition precedent to the effectiveness of the Plan set forth in Article 13 of the Plan.

71. After the Effective Date, NewCal and the New-Cal Subs shall continue to engage in business and the Plan does not provide for the liquidation of all or substantially all of the property of the Debtors' estates.

72. The Debtors have made a careful review of their executory contracts and unexpired leases, and it is a reasonable exercise of the Debtors' business judgment for them to reject all such executory contracts and unexpired leases other than the "Assumed Agreements" referred to in the Plan, i.e., those executory contracts and unexpired leases that have either already been assumed pursuant to an order of the court or are the subject of a pending motion to assume. The assumption on the Effective Date pursuant to section 365 of the Bankruptcy Code of the unexpired aircraft leases identified in Schedule 8 to the Plan, as modified by the Modifications, is the result of the exercise of sound business judgment by the Debtors, and is in the

best interest of the Debtors, their respective bankruptcy estates, and their creditors.

73. Notice of the Modifications was proper under Bankruptcy Rule 3019. The modifications to the Plan contained in the Modifications do not adversely change the treatment of the Claim of any creditor or the interest of any Equity Interest holder who has not accepted the Modifications.

Therefore, THIS COURT HEREBY CONCLUDES, as a matter of law, that:

1. This is a core proceeding within the meaning of 28 U.S.C. § 157.

2. The Court shall confirm a plan if it satisfies all the requirements of section 1129 of the Bankruptcy Code.

3. Notice and distribution of the Plan and the Disclosure Statement were appropriate and complied with the applicable provisions of the Bankruptcy Code and the Bankruptcy Rules. The opportunity for a hearing on these matters was full and adequate.

4. The Plan complies with the applicable provisions of the Bankruptcy Code as required by section 1129(a)(1) thereof, and the Debtors, as proponents of the Plan, have complied with the applicable provisions of the Bankruptcy Code as required by section 1129(a)(2) thereof.

5. The settlements embodied in the Article 2 Provisions are just, within the bounds of reasonableness, and are of substantial benefit to Creditors of all of the Debtors. Accordingly, the standards for approval of such settlements under Bankruptcy Rule 9019(a) are satisfied.

6. The Plan has been proposed in good faith and not by any means forbidden by law as required by section 1129(a)(3) of the Bankruptcy Code.

7. The Plan is feasible and provides adequate means for implementation of the Plan.

8. All Claims against CTA evidenced by or arising under the Subordinated Guarantee of Payments executed by CTA with respect to Depository Preferred Shares representing 11.36% Cumulative Junior Preferred Stock of Eastern, dated as of November 25, 1986, are expressly stated by the terms of such Subordinated Guarantee to be subordinate and junior in right of payment to certain Senior Indebtedness (as defined in such Subordinated Guarantee). Section 4.1 of the Subordinated Guarantee prohibits payment to the beneficiaries of such Guarantee (the "Subordinated Eastern Holders") before the holders of Senior Indebtedness are paid in full. Section 4.2 of the Subordinated Guarantee contains a narrow exception to the prohibition of payments to the Subordinated Eastern Holders. At most, Section 4.2 permits the distribution to Subordinated Eastern Holders of fully-subordinated reorganization securities if a plan of reorganization so provides, and prevents the holders of Senior Indebtedness from complaining that their legitimate rights have not been preserved by such distribution. However, no fully-subordinated reorganization securities are being issued under the Plan. Moreover, nothing in Section 4.2 of the Subordinated Guarantee requires any distribution to Subordinated Eastern Holders. Since the holders of Senior Indebtedness are receiving far less than a 100% recovery, the Plan properly classes such claims as "Subordinated Claims" included in Class 17 and properly enforces the

subordination provisions of the Subordinated Guarantee. *See* section 510(a) of the Bankruptcy Code.

9. The shares of NewCal Common Stock which were originally contemplated by the Disclosure Statement as possibly being issuable to entities other than the Investors, the General Unsecured Creditors, and Continental's pension plan ("Unallocated Shares") will not be issued on the Effective Date and there is no agreement or understanding relating to such issuance. The Unallocated Shares were contemplated to be an asset of NewCal which could be used, among other things, to discharge or consensually settle claims against NewCal, including settlement of claims which might otherwise be entitled to administrative priority. If any of such shares had become available for issuance or distribution, none of such shares could have been distributed to holders of Subordinated Claims or Equity Interests. The Plan specifically provides as contemplated by section 1129(b)(2)(B) of the Bankruptcy Code, that Subordinated Claims and Equity Interests could not receive or retain any property. The Official Committee of Unsecured Creditors has advised the Debtors and the Court that it would oppose any attempt to provide value to Subordinated Claims or Equity Interests. Contrary to the position advanced by the Committee of Equity Security Holders, neither the absolute priority rule nor any other provision of the Bankruptcy Code can be construed to require distribution to junior interests when senior interests have accepted less than full payment of their claims. In this case no class junior to equity interests is receiving any distribution and, accordingly, the Equity Committee cannot invoke the absolute priority rule.

10. Pursuant to section 1127 of the Bankruptcy Code and Bankruptcy Rule 3019, the Modifications should be

and are deemed accepted by all Creditors who have previously accepted the Plan and shall be deemed incorporated into the Plan in their entirety.

11. The Plan Debt Financing, to the extent not approved by previous order of this Court, shall be deemed to be approved in connection with confirmation of the Plan, and the Debtors, NewCal, the NewCal Subs, and Continental Micronesia shall be authorized to enter into the Plan Debt Financing, and to take all steps necessary and appropriate to consummate the transactions contemplated thereby.

Now, upon the motion of the Debtors and after due deliberation, the Court hereby ORDERS, ADJUDGES AND DECREES THAT:

1. The Plan be, and it hereby is, confirmed.

2. The settlements of claims and defenses comprising and included in the Article 2 Provisions are hereby approved pursuant to Bankruptcy Rule 9019(a) as a just, equitable, reasonable, and non-discriminatory compromise of the controversies and Claims resolved by such settlements, and such settlements are binding on all Persons affected thereby.

3. To the extent any Objections to confirmation of the Plan have not been withdrawn prior to entry of this Order or are not cured by the relief granted herein, all remaining Objections to confirmation of the Plan be, and they hereby are, overruled and all withdrawn Objections be, and they hereby are, deemed withdrawn with prejudice.

4. NewCal is authorized to fix, and to give notice to all banks, brokers, depositories, and other similar financial

intermediaries and "street name" holders of the record date for distributions to creditors to be established pursuant to Bankruptcy Rule 3021.

5. The record of the Confirmation Hearing be, and it hereby is, closed.

6. The Debtors are hereby authorized to assume all executory contracts and unexpired leases that are the subject of a motion to assume pending on the date hereof, either without amendment, or with such amendments thereto as shall be a upon between the Debtor party thereto and the non-Debtor parties thereto, and to reject all executory contracts and unexpired leases that are not Assumed Agreements under the Plan. The unexpired aircraft leases identified in Schedule 8 to the Plan, as modified by the Modifications, shall be and hereby are assumed pursuant to section 365 of the Bankruptcy Code, effective as of the Effective Date.

7. In accordance with the Plan, on the Effective Date, (a) CAL will be reorganized as "NewCal," which will continue the airline and related businesses conducted by CAL; (b) each of the other Debtors will merge with and into CAL on the Effective Date, with NewCal as the surviving corporation; (c) NewCal will immediately contribute the assets of the Commuter Debtors to a new wholly-owned subsidiary named Continental Express, Inc. ("NewEx"), which will assume certain related liabilities, and will continue the commuter airline business conducted by the Commuter Debtors; (d) NewCal will immediately contribute the assets of the System One Debtors to a new wholly-owned subsidiary named System One Information Management, Inc. ("NewOne"), which will assume certain related liabilities, and will continue the computer

reservations and related businesses conducted by the System One Debtors; and (e) NewCal will transfer the assets used in the Continental/Air Micronesia operations to a subsidiary, initially 100% owned by NewCal, that will be an independently certificated airline called Continental Micronesia, Inc. ("Continental Micronesia"). NewCal then will contribute all of its equity interest in Continental Micronesia to Air Micronesia, Inc. ("AMI") in exchange for a 91% interest in AMI, and in conjunction therewith, Continental Micronesia and United Micronesia Development Authority, Inc. will enter into various agreements (the "UMDA Agreements") relating to the restructuring of the Continental/Air Micronesia business.

8. In accordance with Section 7.3 of the Plan, all proofs of claim with respect to Claims arising from the rejection of executory contracts or unexpired leases shall be filed with the Bankruptcy Court within thirty (30) days after the date of entry of this Order, unless a separate order of the Court approving such rejection requires filing by an earlier date, or unless a stipulation entered into by the Debtors (or NewCal) and a particular claimant allows for filing a claim at a later date in order to allow the Debtors or NewCal to provide the information necessary to calculate such claim. Any Claims arising from any such rejection not filed within such times shall be forever barred from assertion against the Debtors, their estates and property, or NewCal or any NewCal Sub.

9. In accordance with Section 12.15 of the Plan, the Investment Agreement and the Series A Note Purchase Agreements, are hereby approved or their prior approval is hereby ratified, and the Debtors, NewCal, the NewCal Subs and Continental Micronesia are expressly authorized to take all necessary and appropriate steps, and perform

all necessary and appropriate acts, to consummate the terms and conditions of the Plan, including, without limitation, the mergers and related transactions referred to in Section 12.2 of the Plan and the consummation of the transactions contemplated by the Investment Agreement and the Related Agreements (including the Plan Debt financing) and the other transactions contemplated by Section 12.13 of the Plan. Without limiting the foregoing, NewCal is authorized to consummate the sale of the Series B Notes referred to in the Investment Agreement to Air Canada or one or more third party investors on the terms and conditions described in the Investment Agreement. The Debtors and NewCal are authorized to pay all reasonable fees and expenses (including the Expenses, Hedge Expenses and Indemnity referred to in the Series A Note Commitment agreements and any similar fees and expenses provided for in the documentation relating to the issuance and sale of the Series B Notes) which may be required by the Plan Debt Financing as such become due and as an Allowed Administrative Expense pursuant to section 5079(a)(1) of the Bankruptcy Code.

10. In accordance with section 1141 of the Bankruptcy Code, the Plan and its provisions shall be binding upon the Debtors and their successors (including NewCal and the NewCal Subs) and any other entity created pursuant to the Plan, any Person or entity issuing securities under the Plan, any Person or entity acquiring or receiving property under the Plan, any lessor or lessee of property to or from the Debtors, and any holder of a Claim against or Equity Interest in the Debtors, whether or not the Claim or Equity Interest of such Creditor or Equity Interest Holder is impaired under the Plan and whether or not such Creditor or Equity Interest Holder has filed, or is

deemed to have filed, a proof of Claim or Equity Interest, or has accepted or rejected the Plan.

11. In accordance with section 1141 of the Bankruptcy Code, and except for any security interests provided under the Plan or contemplated by the Financing Transaction, any property transferred or otherwise dealt with in the Plan shall be free and clear of all Claims against and Equity Interests in the Debtors, and all such property of the Debtors' estates shall, on the Effective date, vest in those entities as designated in and provided for by the Plan. Pending the occurrence of the Effective Date, all such property shall remain property of each respective Debtor's bankruptcy estate, and such bankruptcy estates shall continue until the occurrence of the Effective Date.

12. In accordance with Section 14.3 of the Plan and section 1141 of the Bankruptcy Code, except as otherwise specifically provided in the Plan, upon the occurrence of the Effective Date the consideration distributed under the Plan shall be in exchange for and in complete satisfaction, discharge, release, and termination of, all Claims (including, without limitation, all Eastern Claims referred to above) of any nature whatsoever against any Debtor or any of its assets or properties and all Equity Interests in any Debtor; and except as otherwise provided herein or in the Plan, upon the Effective Date (i) each Debtor shall be discharged and released pursuant to section 1141(d)(1)(A) of the Bankruptcy Code from any and all Claims, including but not limited to demands and liabilities that arose before the Effective Date, all Stockholder actions as they relate to such Debtor, all debts of the kind specified in section 502(g), 502(h) or 502(i) of the Bankruptcy Code, whether or not (a) a proof of claim based upon such debt is filed or deemed filed under section 501 of the Bankruptcy

Code; (b) a Claim based upon such debt is allowed under section 502 of the Bankruptcy Code; or (c) the holder of a Claim based upon such debt has accepted the Plan, and (ii) all rights and interests of holders of Equity Interests in each Debtor shall be terminated pursuant to section 1141(d)(1)(B) of the Bankruptcy Code. This Order shall be a judicial determination, effective on the occurrence of the Effective Date, of discharge and termination of all liabilities of and all Claims against, and all Equity Interests in, each Debtor, except as otherwise specifically provided in the plan. On the Effective Date, as to every discharged debt, Claim and Equity Interest, the Creditor or Equity Interest holder that held such debt, Claim or Equity Interest is permanently enjoined and precluded from asserting against NewCal or any NewCal Sub, or against their assets or properties or any transferee thereof, any other or further Claim or Equity Interest based upon any document, instrument or act, omission, transaction or other activity of any kind or nature that occurred prior to the Effective Date, except as expressly set forth in the Plan.

13. In accordance with section 524 of the Bankruptcy Code, effective on the occurrence of the Effective Date, this Order:

> (i) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the Debtors with respect to any debt or Claim discharged hereby; and
>
> (ii) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt or Claim as a personal

liability of the Debtors, NewCal, any NewCal Sub or Continental Micronesia.

14. On the Effective Date, the transfers of assets by the Debtors contemplated by the Plan will be legal, valid, binding and effective transfers of property and will, to the fullest extent permitted by the Bankruptcy Code, vest in the respective transferee good title to such property, free and clear of all liens, Claims and encumbrances, except as otherwise provided for by the Plan or as required in order to implement the Financing Transaction. The creation and perfection on the Effective Date of the liens securing the Series A Notes and the Series B Notes will not be made with actual intent to hinder, delay, or defraud any entity, will be made for reasonably equivalent value, will not result in the insolvency of NewCal or Continental Micronesia, will not leave NewCal or Continental Micronesia with unreasonably small capital with which to conduct its businesses, will not be made with the intent or belief that NewCal or Continental Micronesia would incur debts that NewCal or Continental Micronesia, respectively, would be unable to pay is they become due, nor in any other manner constitute fraudulent conveyances or transfers. The establishment of Continental Micronesia's business in conformity with the provisions of the Series a Note Purchase Agreements will not result in significant commingling or entangling of the assets of Continental Micronesia with the assets of NewCal, will create a free-standing operating entity, and will not constitute a basis for substantive consolidation of the assets of Continental Micronesia with the assets of NewCal.

15. In accordance with section 1142 of the Bankruptcy Code, the Debtors, NewCal, each NewCal Sub, and any other entity created or Person designated pursuant to

the Plan be, and they hereby are, authorized, empowered and directed to issue, execute, deliver, file and record any document, and to take any action necessary or appropriate to implement, effectuate and consummate the Plan and the Financing Transaction and any transactions contemplated thereby in accordance with their respective terms, whether or not any such document is specifically referred to in the Plan, the Investment Agreement, the Plan Debt Financing or any exhibits thereto, and without further application to or order of this court. Pursuant to section 1142(b) of the Bankruptcy Code, but subject to the retained jurisdiction of the Court to resolve disputes as provided in the next sentence, all Persons holding Claims or Equity interests which are dealt with under the Plan be, and they hereby are, directed to execute, deliver, file or record any document, and to take any action necessary to implement, effectuate and consummate the Plan in accordance with its terms, and all such Persons shall be bound by the terms and provisions of all documents to be executed by them in connection with the Plan, whether or not such documents actually have been executed by such Persons. The Court retains jurisdiction to hear and determine any dispute concerning the proposed application of section 1142 of the Bankruptcy Code and of the preceding sentence. The foregoing shall not, however, in any manner adversely affect or impair any of the rights of the parties to the Investment Agreement or the Plan Debt Financing pursuant to, or release any such party from any condition under, the agreements and instruments relating thereto.

16. All steps necessary (i) for NewEx and NewOne to be duly incorporated and (ii) to effect the mergers, contributions of assets and assumptions of liability as contemplated

by the Plan be, and they hereby are, authorized and approved.

17. Pursuant to Section 12.11 of the Plan, from and after the Effective Date, NewCal and the NewCal Subs may use, operate and deal with their respective assets, and may conduct and change their businesses, without any supervision by the Bankruptcy Court or the Office of the United States Trustee, and free of any restrictions imposed on the Debtors by the Bankruptcy Code or by the Court during these Chapter 11 cases.

18. All Equity Interests in each Debtor be, and they hereby are, canceled effective as of the Effective Date.

19. In accordance with Section 14.5 of the Plan, the Equity committee shall, unless theretofore terminated, terminate on the Confirmation Date and shall thereafter have no further responsibilities in respect of these Chapter 11 cases except with respect to preparation and filing of final applications for compensation and reimbursement of expenses, which shall be filed within 90 days from the Effective Date.

20. In accordance with Section 14.4 of the Plan, the Official Committee of Unsecured Creditors shall continue in existence as the Post-Effective Date Committee for the purposes and subject to the limitations set forth in the Plan. The members of the Post-Effective Date Committee shall receive compensation for services and reimbursement of expenses as and to the extent set forth in Section 14.4(d) of the Plan and such members and any professionals retained by the Post-Effective Date Committee shall be indemnified on the terms and to the extent set forth in Section 14.4(g)of the Plan. The reasonable and necessary expenses of professionals retained by the Post-Effective

Date Committee shall be paid by NewCal on the terms and to the extent set forth in Section 14.4(d) of the Plan.

21. Pursuant to Section 10.3(a)(ii) of the Plan, all Indentures under which Substantial Contribution Trustees (other than Banque Paribas) serve shall be deemed to have terminated, and the rights, duties and obligations of such trustees shall be discharged, on the terms and with the exceptions set forth in the Plan. Except as may have been or may be provided by order of the Court, all Indenture Trustees other than Substantial Contribution Trustees shall be required to give notice to NewCal as Distribution Agent under the Plan of their election whether or not to serve as disbursing agent pursuant to Section 10.3(a)(i) of the Plan within thirty (30) days following the Effective Date. The Indenture under which an Indenture Trustee who fails to give such notice serves shall be deemed to have terminated, as set forth in Section 10.3(a) of the Plan.

22. (a) Pursuant to the Plan, and in accordance with section 1142 of the Bankruptcy Code, the Debtors are hereby authorized to take such corporate action as may be necessary and appropriate to implement and effectuate consummation of the Plan and the Financing Transaction, each of the agreements and instruments referred to therein or contemplated thereby (including all documents, instruments, certificates and agreements to be entered into pursuant to the Plan or the Financing Transaction by the Debtors, NewCal, or any NewCal Sub and any successors to the Debtors) (the "Agreements"), and this Order. Such authorization includes, without limitation, authority to execute and deliver one or more merger agreements providing for the merger of all of the Debtors other than CAL into CAL, with NewCal as the surviving entity, in

accordance with and pursuant to the terms of the Plan (the "Merger Agreements"). Any one or more of Robert Ferguson, Charles Goolsbee, John Luth and Beth Hessler or any other President, Vice President or Secretary of any of the Debtors, as necessary, are hereby designated to execute, on behalf of one or more of the Debtors, the Agreements, the Merger Agreements, any preferred stock designations, and any other certificate, articles or other documents that such officer or officers deem necessary or advisable in order to consummate the mergers and to otherwise effectuate the Agreements, the Merger Agreements, the Financing Transaction, the UMDA Agreements and the Plan.

(b) This Order shall constitute all approvals and consents, including without limitation, approvals of the boards of directors and shareholders of each of the Debtors, if any, required by the laws of the States of Delaware, California, Texas, Colorado and Nevada (and the laws of any other state) with respect to the implementation and consummation of the Plan and the Investment Agreement and Related Agreements, including without limitation, the election of the Board of Directors of NewCal (which shall consist of the persons identified as such at the Confirmation Hearing and whose names are set forth on Schedule 5 to the Plan, filed as an Exhibit to the Second Modification), the adoption of the Restated Certificate and By-Laws of NewCal, the adoption of any certificate of designation for preferred stock to be issued pursuant to the Plan or the Financing Transaction, the election of the officers of NewCal by the Plan, the adoption of all necessary and appropriate resolutions consistent with the Plan or the Financing Transaction, the mergers contemplated by the Plan, and the execution, delivery and performance of the

Agreements and the Merger Agreements and the transactions contemplated by the Agreements and the Merger Agreements. The Secretary of State of the States of Delaware, Texas, Colorado, Nevada and California (and any other state and any other governmental agency, board, bureau or office of any of the foregoing or the United States or any other state) are authorized and directed to accept for filing and to file any certificates or articles of merger, the Merger Agreements, restated certificates of incorporation, certificates of designation for preferred stock, or other instruments necessary and to take any and all other actions necessary to give effect to the mergers and such other transactions contemplated by the Merger Agreements, the Agreements and the Plan.

23. Pursuant to the Plan and in accordance with section 1142 of the Bankruptcy Code, The restated Certificate and the By-Laws of NewCal in the forms annexed as Exhibits to the Second Modification be and hereby are, directed to be the Restated Certificate and By-Laws of NewCal, effective as of the Effective Date, and CAL is hereby authorized to file with the Secretary of State of the State of Delaware, or with any other governmental agency, board, bureau or office within or without the State of Delaware, such Restated Certificate and as appropriate, the By-Laws, and the Debtors are hereby authorized to take any and all actions necessary to provide that such Restated Certificate and By-Laws shall be in effect as of the Effective Date. Each of the three Directors of NewCal designated by the Creditors' Committee shall serve initial terms of three years commencing on the Effective Date.

24. On the Effective Date, NewCal shall pursuant to Section 10.2(a) of the Plan issue the Creditors' NewCal Stock and the additional NewCal Common Stock, and

shall deliver the Class Cash, to the Distribution Agent to be held in trust pursuant to the Plan, giving effect to the election by Classes 13 and 14 to receive Additional NewCal Common Stock and by Classes 15 and 16 to receive additional Class Cash in lieu of Additional NewCal Common Stock. The Distribution Agent shall distribute such Creditors' NewCal Stock, Additional NewCal Common Stock, and Class Cash to each holder of an Allowed General Unsecured Claim as provided in the Plan, and shall otherwise perform its obligations under section 10.2 of the Plan.

25. Pursuant to section 1145 of the Bankruptcy Code, the issuance of the Creditors' NewCal Stock and the Additional NewCal Common Stock to the Distribution Agent, and the distribution thereof to holders of allowed General Unsecured Claims as provided by the Plan, shall be exempt from the provisions of section 5 of the Securities Act of 1933, as amended (15 U.S.C. § 77(e), as amended) and any state or local law requiring registration for the offer or sale of a security or registration or licensing of an issuer of, underwriter of, or broker or dealer in, a security.

26. Pursuant to section 1146(c) of the Bankruptcy Code, but subject to any stipulation between the Debtors and any taxing authority previously approved and so ordered by the Court, neither the issuance, transfer or exchange of a security under the Plan (including to AP and AC pursuant to the Investment Agreement) nor the making nor delivers of an instrument of transfer nor the revesting, transfer and sale of any real or personal property of the Debtors in accordance with the Plan (including without limitation, the PBGC Settlement, the IRS Settlement, and the Financing Transaction including without limitation the Plan Debt Financing and the creation and

perfection of any lien or security interest in connection therewith, each as contemplated by the Plan), the merger transactions and contributions of assets contemplated by Section 12.2 of the Plan, nor any of the integral transactions referred to in Section 12.13 of the Plan, shall subject the Debtors, NewCal or the NewCal Subs to any state or local sales, use, transfer, documentary, recording, or gains tax.

27. The Disputed Administrative Claims of NationsBank on account of Market Decline are Allowed in the amount, if any, referred to with respect to such Claims in paragraph 34 of the Findings of Fact included within this Order, and any and all alleged or asserted Administrative Claims of NationsBank by reason of Market Decline other than such Allowed Claim, if any, are disallowed as Administrative Claims. No Eastern Claims referred to above shall be entitled to any administrative or other priority over General Unsecured Claims or to specific performance or to any injunctive or equitable relief, or other prospective relief.

28. The Debtors and NewCal are hereby authorized to execute and deliver, and to take all necessary or appropriate actions to effectuate, the New Aircraft Agreements.

29. Allowed Claims under the Chase DIP Loan Agreement and related documents, including all Claims for principal, interest, fees, expenses and other amounts constituting "Obligations" thereunder, shall be paid in full in Cash by CAL on the Confirmation Date or such later date as may be agreed upon by CAL or NewCal and the holders of such Claims pursuant to the terms of the Chase DIP Loan Agreement. As of April 12, 1993, Allowed Claims under the Chase DIP Loan Agreement and related

documents include the Allowed Claim of The Chase Manhattan Bank (National Association) in the amount of $16,709,360.73; the Allowed Claim of Mellon Bank, N.A. in the amount of $11,700,064.44; the Allowed Claim of Internationale Nederlanden Bank N.V. (formerly NMB Postbank Groep N.V.) in the amount of $11,696,522.51; and the Allowed Claim of The Chase Manhattan Bank (National Association), as Agent, in the amount of $103,051.25.

30. Notwithstanding anything to the contrary provided herein or in the Plan, the obligations of CAL described in Section 11.7 of the Chase DIP Loan Agreement shall survive the occurrence of the Confirmation Date and the discharge of Claims under section 1141 of the Bankruptcy Code, the Plan and this Order.

31. The Final Bidding Procedures Order, the Investment Agreement and the Interim Procedures Approval Order shall survive the entry of this Order and shall remain in full force and effect.

32. Pursuant to the Restated Certificate, NewCal has elected not to be governed by the provisions of Section 203 the Delaware General Corporation Law.

33. On March 16, 1993, the Internal revenue Service and the Debtors entered into a "Stipulated Withdrawal of United States Internal Revenue Service's Objection to Debtors' Second Amended Plan of Reorganization." Such stipulation is hereby approved pursuant to Bankruptcy Rule 9019(a) as a just, equitable and non-discriminatory compromise of the Internal Revenue Service's Objection to Second Amended Joint Plan of Reorganization, which the IRS filed on March 9, 1993.

34. The PBGC Settlement is in settlement of liability under title IV of the Employment Retirement Income Security Act of 1974, and was entered into by the PBGC and one or more other parties before, on or after the date of the enactment of the Aircraft Equipment Settlement Leases Act of 1993; the Debtors are parties to such settlement and were debtors under the Bankruptcy Code; and each lease which covers any Aircraft identified in Schedule 4(f) to the PBGC Settlement and which will be entered into between certain Owner Trusts as lessors and NewCal as lessee pursuant to the PBGC Settlement will provide that such lease agreements are to be treated as leases. Accordingly, all such lease agreements between such Owner Trusts as lessors and NewCal as lessee shall be treated as leases for purposes of section 1110 of the Bankruptcy Code.

35. Notwithstanding confirmation of the Plan, this Court retains exclusive jurisdiction over the Debtors' Chapter 11 cases pursuant to and for the purposes of (a) sections 105(a) and 1127 of the Bankruptcy Code, (b) Section 15.1 of the Plan, and (c) for such other purposes as may be necessary or useful to aid in the confirmation and consummation of the Plan and its implementation. Except as may have been expressly provided in prior orders of the Court, notwithstanding anything in the Plan to the contrary, the Court shall retain sole and exclusive jurisdiction to determine any dispute or cause of action arising under an agreement or arrangement approved by the Court providing for a sale, transfer or assignment of assets of any of the Debtors.

36. Pursuant to Bankruptcy Rule 3020(c), the Debtors shall (i) promptly serve notice of the entry of this Order as provided in Bankruptcy Rule 2002(f) to all Creditors and other parties in interest, to be sent by first-class

mail, postage prepaid, except to such parties who may be served by hand or facsimile or overnight courier, which service is hereby authorized, and (ii) cause notice of entry of this Order to be published in *The Wall Street Journal,* national edition and such other publications as Debtors may designate. It is impracticable for the Debtors to mail notice to all Equity Interest Holders since such mailing would be of considerable expense to the Debtors and would be of very limited benefit, inasmuch as in prior mailings, a large percentage of notices mailed to Equity Interest Holders were returned as undeliverable. Accordingly, notice by publication as set forth above shall constitute good and sufficient notice pursuant to Bankruptcy Rules 2002(l) and 3020(c), to all holders of Equity Interests, of the entry of this Order. Such notice shall include notice to all parties to executory contracts and unexpired leases of the bar date for filing of rejection claims specified in Section 7.3 of the Plan and decretal paragraph 8 above.

37. To the extent that any provision designated herein as a Finding of Fact is more properly characterized as a Conclusion of Law, it is adopted as such. To the extent that any provision designated herein as a Conclusion of Law is more properly characterized as a Finding of Fact, it is adopted as such. The provisions of this Order are integrated with each other and are nonseverable and mutual dependent.

Dated: Wilmington, Delaware
April 16, 1993

/s/ Helen S. Balick
Helen S. Balick
United States
Bankruptcy Judge

Appendix A-1 to Plan
Confirmation Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

| | | |
|---|---|---|
| In re | ) | |
| CONTINENTAL AIRLINES, INC., *et al.*, | ) | Chapter 11<br>Consolidated Case Nos. 90-932 through 90-984 |
| Debtors. | ) | |
| CONTINENTAL AIRLINES, INC., CONTINENTAL AIRLINES HOLDINGS, INC., and SYSTEM ONE HOLDINGS, INC., | ) | Adversary Proceeding No. 91-153 |
| Plaintiffs, | ) | |
| v. | ) | |
| AIR LINE PILOTS ASSOCIATION INTERNATIONAL, CHARLES H. COPELAND, RONALD COLE, MATTHEW J. GIOIA and LARRY D. SCHULTE, | ) | |
| Defendants. | ) | |
| ELIZABETH A. HASTINGS-MURTAUGH and DANIEL P. MURTAUGH, | ) | |
| Intervenors. | ) | |

ORDER

On December 18, 1992, Continental Airlines, Inc. ("Continental") and Continental Airlines Holdings, Inc., formerly known as Texas Air Corporation ("CTA" or "Texas Air") (collectively "Debtors") filed a motion for partial summary judgment under Fed. R. Civ. P. 56 and

Bankruptcy Rule 7056, notice of which was timely given to defendants. By their Motion, Debtors seek to determine whether certain labor protective provision ("LPP") claims filed by the Air Line Pilots Association, International ("ALPA") and the four named individual defendants (collectively, with ALPA, the "Defendants"), if eventually determined to be valid, are general unsecured prepetition "claims" within the meaning of 11 U.S.C. § 101(5).

On February 4, 1993, this Court held oral argument on Debtors' motion and after considering the arguments of counsel, pleadings, affidavits and exhibits on file, it is hereby

FOUND AND CONCLUDED that the Defendants have filed proofs of claim in this case that include, *inter alia*, claims allegedly based on LPPs contained in a February 23, 1986 collective bargaining agreement ("CBA") between ALPA and Eastern Air Lines, Inc., ("Eastern"), which claims ALPA has attempted to assert against Debtors in an arbitration proceeding (the "LPP Claims");

FOUND AND CONCLUDED that the LPP Claims seek, *inter alia*, back pay, front pay and specific performance of the LPPs by Debtors, and that if specific performance were granted, it could lead to the integration of the former Eastern pilots into the Continental pilot seniority list;

FOUND AND CONCLUDED that, if the LPP Claims were ultimately found to be valid, an award of monetary damages to the Defendants would be available as a matter of law in lieu of prospective relief, including specific performance;

FOUND AND CONCLUDED that the issue of whether any award granted to Defendants as a result of their LPP Claims would constitute a general unsecured prepetition claim against Debtors is a core matter under the Bankruptcy Code. Bankruptcy Code Section 101(5)(A) defines a "claim" to include a right to payment whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured. Section 101(5)(B) further defines a claim to include a right to an equitable remedy for breach of performance if such breach gives a rise to a right for payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured or unsecured. Because, as found and concluded above, if the LPP Claims are ultimately determined to have merit, any award ultimately rendered in Defendants' favor can be satisfied by money damages in the form of back and/or front pay, any such award would result in a claim within the meaning of Section 101(5)(A) and (B). As a core proceeding under the Bankruptcy Code, the determination of whether Defendants' LPP Claims constitute "claims" within the meaning of Section 101(5) falls within this Court's jurisdiction;

FOUND AND CONCLUDED that the LPP Claims constitute "claims" within the meaning of Section 101(5) of the Bankruptcy Code;

FOUND AND CONCLUDED that the status of Defendants' LPP Claims as general unsecured prepetition claims is determined by whether Defendants' possessed a right to payment and when that right to payment arose. *In re Remington Rand Corp.*, 836 F.2d 825, 830 (3d Cir.

1988); *see In re Roth American, Inc.*, 975 F.2d 949, 957 (3d Cir. 1992); *In re Chateauqay Corp.*, 87 Bankr. 779, 796 (S.D.N.Y. 1988), *aff'd sub nom. Pension Benefit Guaranty Co. v. LTV*, 875 F.2d 1008 (2d Cir. 1989), *rev'd on other grounds*, 496 U.S. 633 (1990). The record reveals that the events upon which the Defendants base the LPP Claims, including the formation of the CBA, the acquisition of Eastern by Texas Air, Texas Air's stipulation approved by the Department of Transportation in 1989, and the other events or transactions that Defendants allege have given rise to obligations or liability on the part of the Debtors under the LPPs, all occurred prior to December 3, 1990, the date that Debtors filed their petitions for reorganization in this case. Thus, the LPP Claims assert a right to payment which, if it arose at all, arose prepetition;

FOUND AND CONCLUDED that, to the extent Defendants claim that at least a portion of their LPP Claims are entitled to administration priority or prospective relief, including specific performance, based on various theories, including Defendants' assertion that the LPPs were triggered by certain post-petition transactions, their "creeping merger" theory, and their claim that Debtors' failure to comply with the LPPs conferred a benefit to Debtors' estates, Defendants have not, as required by Fed. R. Civ. P. 56(e), set forth specific facts by affidavits or as otherwise provided by the Rule showing that there is a genuine issue for trial;

FOUND AND CONCLUDED that there is no genuine issue as to any material fact and that Debtors are entitled to judgment as a matter of law;

FOUND AND CONCLUDED that Debtors are entitled to partial summary judgment as a matter of law, that the LPP Claims are, at best, general unsecured prepetition claims and are dischargeable, and as such are not entitled to administrative priority or prospective relief, including specific performance,

ACCORDINGLY, IT IS HEREBY ORDERED that Debtors' Motion for Partial Summary Judgment is granted in its entirety as to the LPP Claims filed by Defendants, and that the LPP Claims, if valid at all, are general unsecured prepetition claims and are dischargeable, and are not entitled to any administrative priority or prospective relief, including specific performance; and

IT IS FURTHER ORDERED that the relief granted here does not prejudice any other objections that Debtors have filed or will file to any and all of the Defendants' claims, including their other objections to LPP Claims.

DATED: Wilmington, Delaware
February 11, 1993

/s/ Helen S. Balick
Helen S. Balick
United States
Bankruptcy Judge

Appendix A-2 to Plan
Confirmation Order

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

| | | |
|---|---|---|
| In re | ) | Chapter 11 |
| CONTINENTAL AIRLINES, INC., *et al.*, | ) | Consolidated Case Nos. 90-932 through 90-984 |
| Debtors. | ) | |

ORDER

Upon the Partial Objection To Allowance of Claims Based On Certain Alleged Labor Protective Provisions Involving The Air Line Pilots Association, International ("ALPA") And Eastern Air Lines, Inc. ("Eastern") (the "Partial Objection"), filed by debtors Continental Airlines, Inc. and Continental Airlines Holdings, Inc. (collectively, "Debtors") on December 22, 1992, notice of which was timely given to the affected claimants, and after considering the Partial Objection, the oppositions, and oral argument by Debtors and other affected parties, it is hereby

FOUND AND CONCLUDED that approximately 2770 persons filed proofs of claim that include, *inter alia*, claims allegedly based on labor protective provisions ("LPPs") contained in a February 23, 1986 collective bargaining agreement ("CBA") between ALPA and Eastern, which claims ALPA has attempted to assert against Debtors in an arbitration proceeding (the "LPP Claims");

FOUND AND CONCLUDED that the Partial Objection notified the persons who filed proofs of claim based on the LPP Claims (the "LPP Claimants") that Debtors objected to that portion of the LPP Claims that sought

administrative expense status or prospective relief, including specific performance because:

1. The collective bargaining agreement out of which the claims arose was executed and expired prepetition;
2. The events that are alleged to have given rise to obligations on Debtors' part under the LPPS all occurred prepetition;
3. Even if such obligations arose, they can be satisfied through an alternative right to payment cognizable as a general unsecured claim; and
4. The LPP Claims are not based on any post-petition services performed for Debtors;

FOUND AND CONCLUDED that the Partial Objection notified the LPP Claimants that Debtors had on December 18, 1992 filed a motion in Adversary Proceeding No. 91-153 in this Court seeking partial summary judgment as to ALPA, which had asserted the LPP Claims on behalf of Eastern pilots; that the motion was to be heard on February 4, 1993; that, if granted, the LPP Claims would be determined to be, at best, dischargeable general unsecured prepetition claims under 11 U.S.C. § 101(5); and that Debtors' December 18, 1992 Motion for Partial Summary Judgment in Adversary Proceeding No. 91-153 was incorporated by reference in the Partial Objection;

FOUND AND CONCLUDED that the Partial Objection further notified the LPP Claimants that Debtors believed that because ALPA is the collective bargaining representative for the Eastern pilots, and because the LPP Claimants are relying on an arbitration proceeding initiated by ALPA on their behalf to establish their rights under the LPPs, a ruling declaring ALPA's LPP Claims to

be general unsecured prepetition claims would be binding as to the LPP Claimants, and that, if any person did not concede that the ruling as to ALPA would be binding, that person should file a written response;

FOUND AND CONCLUDED that the Notice of Partial Objection notified the LPP Claimants that responses to the Partial Objection had to be filed in writing by January 25, 1993, and that a hearing on the Partial Objection was to be held on February 4, 1993;

FOUND AND CONCLUDED that 41 written responses to the Partial Objection were filed by LPP Claimants, including one response by counsel for over 600 LPP Claimants (the "600"), which counsel also appeared and was heard at the February 4, 1993 hearing on this Partial Objection;

FOUND AND CONCLUDED that the LPP Claims, *inter alia*, back pay, front pay and specific performance of the LPPs by Debtors, and that if specific performance were granted, it could lead to the integration of the former Eastern pilots into the Continental pilot seniority list;

FOUND AND CONCLUDED that, if the LPP Claims were ultimately found to be valid, an award of monetary damages to the LPP Claimants would be available as a matter of law in lieu of prospective relief, including specific performance;

FOUND AND CONCLUDED that the LPP Claims are "claims" within the meaning of Section 101(5) of the Bankruptcy Code;

FOUND AND CONCLUDED that the status of the LPP Claims as general unsecured prepetition claims is determine by whether the Claimants' possessed a right to payment and when that right to payment arose. *In re Remington Rand Corp.*, 836 F.2d 825, 830 (3d Cir. 1988); *see In re Roth American, Inc.*, 975 F.2d 949, 957 (3d Cir. 1992); *In re Chateauqay Corp.*, 87 Bankr. 779, 796 (S.D.N.Y. 1988), *aff'd sub nom. Pension Benefit Guaranty Co. v. LTV*, 875 F.2d 1008 (2d Cir. 1989), *rev'd on other grounds*, 496 U.S. 633 (1990). The record reveals that the events upon which the Claimants base the LPP Claims, including the formation of the CBA, the acquisition of Eastern by Texas Air, Texas Air's stipulation approved by the Department of Transportation in 1989, and the other events or transactions that the Claimants allege have given rise to obligations or liability on the part of the Debtors under the LPPs, all occurred prior to December 3, 1990, the date that Debtors filed their petitions for reorganization in this case. Thus, the LPP Claims assert a right to payment which, if it arose at all, arose prepetition;

FOUND AND CONCLUDED that the Court has granted Debtors' December 18, 1992 Motion for Partial Summary Judgment in Adversary Proceeding No. 91-153 as to ALPA's LPP Claims, and, having considered the responses of the LPP Claimants and the arguments of counsel for the 600, the Court finds that its ruling as to ALPA's LPP Claims is binding on both the 600 LPP Claimants represented by counsel and the other LPP Claimants;

FOUND AND CONCLUDED further that, having considered the responses of the LPP Claimants and the arguments of counsel for the 600, and having found that

the contentions of the LPP Claimants in opposition to Debtors' Partial Objection are not supported by the record, the LPP Claims are, at best, general unsecured prepetition claims and are dischargeable, and as such are not entitled to administrative priority or prospective relief, including specific performance,

ACCORDINGLY, IT IS HEREBY ORDERED that the Partial Objection is granted, and that the LPP Claims, if valid at all, are hereby determined to be, at best, dischargeable general unsecured prepetition claims that are not entitled to any administrative priority or prospective relief, including specific performance; and

IT IS FURTHER ORDERED that the relief granted here does not prejudice any other objections that Debtors have filed or will file as to any and all of the LPP Claimants' claims, including Debtors' other objections to the LPP Claims.

Wilmington, Delaware
February 11, 1993

/s/ Helen S. Balick
Helen S. Balick
United States
Bankruptcy Judge

Appendix B to Plan

Confirmation Order

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

| | | |
|---|---|---|
| In re | : | |
| CONTINENTAL AIRLINES, INC., *et al.*, | : | Case Nos. 90-932 through 90-984 |
| Debtors. | : | |

**ORDER**

Upon the Second Partial Objection to Allowance of Administrative Claims Based on Certain Alleged Labor Protective Provisions ("LPP Claims") Involving the Air Line Pilots Association, International and Eastern Air Lines, Inc. (the "Second Partial Objection"), filed by debtors Continental Airlines, Inc. and Continental Airlines Holdings, Inc. ("Debtors"), on January 29, 1993, notice of which was timely given to the affected claimants, and after considering the Second Partial Objection, the opposition thereto, and the statements of the parties at hearing on March 25, 1993, it is hereby

FOUND AND CONCLUDED that (1) approximately 635 claimants filed administrative LPP Claims in December 1992, (2) approximately 230 of these administrative claimants had not previously filed an LPP Claim, and therefore had not been served with Debtors' First Partial Objection, filed on December 22, 1992, (3) other than being filed as administrative claims, the LPP Claims filed in December 1992 are no different than the LPP Claims addressed and resolved by this Court's Orders dated

February 11, 1993 (the "February 11 Orders"), and (4) the findings and conclusions contained in the February 11 Orders should be applied in all respects to the LPP Claims subject to the Second Partial Objection.

ACCORDINGLY, IT IS HEREBY ORDERED that Debtors' Second Partial Objection is GRANTED.

Dated: Wilmington, Delaware
April 16, 1993

/s/ Helen S. Balick
Helen S. Balick
United States
Bankruptcy Judge

Appendix C to Plan

Confirmation Order

IN THE UNITED STATES BANKRUPTCY COURT

FOR THE DISTRICT OF DELAWARE

| | | |
|---|---|---|
| In the Matter of | : | Case Nos. 90-932 |
| CONTINENTAL AIRLINES, INC., *et al.*, | : | through 90-984 |
| | : | Motion No. 92-258 |
| Debtors. | : | |

**MEMORANDUM OPINION AND ORDER**

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April 16, 1993

Balick, J.

This is the Court's decision on the Motions of NationsBank of Tennessee (NationsBank or Collateral trustee), as successor Collateral Trustee under a certain Secured Equipment Indenture and Lease Agreement, dated March 15, 1987 (the Indenture), and the National State Bank of Elizabeth, New Jersey, Harris Trust and Savings Bank and Boatmen's First National Bank of Oklahoma, N.A., as successor First, Second and Third Priority Secured Equipment Certificates Trustees under the Indenture (collectively with NationsBank, the Trustees or Movants) for Relief from the Automatic Stay and for Adequate Protection for alleged decrease in the market value of the NationsBank collateral.

## NATURE AND STAGE OF PROCEEDINGS

The Movants act as trustees under the Indenture pursuant to which Continental Airlines, Inc. obtained $350 million in operating capital by causing to be issued and sold to the public three series of certificates, consisting of First, Second and Third Priority Secured Equipment Certificates. As security for repayment of the Certificates, Continental sold to the Collateral Trustee all of its right, title and interest in and to various aircraft and additional engines (the collateral).

On December 3, 1990 (Petition Date) Continental and its affiliates (Continental or Debtors) filed for relief from its creditors under Chapter 11 of the bankruptcy Code and currently operate as debtors-in-possession under sections 1107 and 1108 of the Code. As of the petition date, the

Trustees were secured by 29 aircraft (with engines) and 77 additional jet engines.[1]

On February 21, 1991, the predecessor Collateral Trustee, First Fidelity Bank of New Jersey, N.A. (First Fidelity) joined in filing an Omnibus Motion for Order compelling Payment of Administrative Rent, Granting Adequate Protection and Fixing Time for assumption or Rejection of Unexpired Leases (Omnibus Motion). First Fidelity subsequently withdrew from the Omnibus Motion and, on June 28, 1991, filed its Joint Motion of Collateral Trustee and First, Second, and Third priority Secured Equipment Certificates Trustees under the $350 Million Secured Equipment Indenture for Adequate Protection. That motion was tried on September 3-6, 1991, along with adequate protection motions filed by Wilmington Trust Company and The Bank of New York (First Adequate Protection Hearing). The Court bifurcated the issues relating to the collateral's value and heard evidence regarding market value decline, deferring to a later date the issues of use and maintenance decline. On August 27, 1992, this Court issued a Memorandum Opinion and Order (August 27 Decision) in which it found that the Trustees were not entitled to adequate protection due to market value decline of the collateral.

On August 14, 1992 the Trustees filed a Motion for Relief from the Automatic Stay pursuant to § 362(d)(1) of the Bankruptcy Code for failure of adequate protection and pursuant to § 362(d)(2) of the Bankruptcy Code

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[1] Pursuant to Court orders, dated June 25, 1992 and October 6, 1992, Continental abandoned to the Trustees four airframes and eleven engines. The Trustees seek adequate protection for the decline in value of this equipment through the date of its abandonment.

because the Debtor lacks equity in the collateral, and the collateral is not necessary for an effective reorganization. Subsequent to the Court's August 27 ruling, the Trustees moved by motion, dated September 14, 1992, for adequate protection for market value decline from July 1991 forward and for use and maintenance decline from the petition date forward (Renewed Adequate Protection Motion).

Wilmington Trust Company and Bank of New York also filed motions renewing their requests for adequate protection, and the Court decided to hear the renewed Adequate Protection Motions of all three parties simultaneously and to again limit the evidence to market value decline. Prior to the conclusion of the nine-day hearing which began on November 3, 1992 and concluded on February 5, 1993, Wilmington Trust Company and Bank of New York reached negotiated settlements with Continental and withdrew from the proceedings.

Several facts were stipulated to by Movants and Continental and are relevant to the motions at issue. First, the parties agreed that the NationsBank collateral is subject to a properly perfected security interest enforceable against Continental's estate. Second, the parties agreed that Continental has no equity in the collateral as contemplated by § 362(d)(2)(A) of the Bankruptcy Code. Finally, the parties stipulated to the authenticity and genuineness of the Avitas Blue Books, published from 1990 through 1992, as established by the testimony elicited at the deposition of Donald C. Benfell of Avitas authenticating these documents.

During the hearing, evidence was presented regarding the alleged decline in the market value of the NationsBank

collateral and the necessity of that collateral to an effective reorganization of Continental. Following the hearing, the parties submitted post-trial briefs addressing the issues before the court.

CONTENTIONS OF THE PARTIES

Movants assert that the doctrine of law of the case precludes this Court from deciding certain issues previously addressed in the Court's August 27, 1992 Decision. Thus, according to the Trustees, the Court is bound by its statement that "§ 363(e) implies that adequate protection may be sought [independent of a motion for relief from stay]". Movants also argue the Court's reliance on the January and July 1991 Avitas Blue Books and factual finding that the market value of the aircraft contained in NationsBank's collateral, as of approximately May 1991, was as stated in the July 1991 Blue Book[2], requires the Court to be bound by that finding in its determination of the present motions.

Second, the Trustees maintain that they are entitled to adequate protection because subsequent Avitas Blue Books indicate that the market value of NationsBank's collateral has seriously declined since May, 1991. It is Movants' position that the decline in the value of the collateral aircraft has actually been steeper than is shown in the Blue Books.

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[2] In its August 27, 1992 Decision, the Court recognized that the values listed in the Avitas Blue Books lag the market by two or three months. Thus, the July 1991 Blue Book reflects May 1991 values.

Movants also argue that the stay should be lifted because Debtors have no equity in the collateral, and the collateral is not necessary for an effective reorganization of Continental.

It is Continental's position that the Trustees are not entitled to any adequate protection for market value decline before August 14, 1992, the date the Trustees filed their Motion for Relief from the automatic Stay, and only then if the collateral declined below petition date value. Continental contends any inference to the contrary in the Court's August 27 Decision is merely *dicta,* and therefore, the issue may be revisited by the Court.

Alternatively, Debtors argue that even if the market value issue was properly raised by Movants' first adequate protection motion, Movants are still only entitled to adequate protection if the collateral declined in market value to an amount less than its value on the petition date. According to debtors, in either case, it is only relevant whether the collateral is worth more or less now than it was on December 3, 1990.

Additionally, Continental contends that the Court's reliance on the Avitas Blue Books in its August 27 Decision does not require the Court to rely on the Blue Books for purposes of the present motions.

Finally, Debtors argue that the collateral is necessary to its reorganization efforts because any precipitous removal of the collateral, affecting approximately one-third of its fleet, would have disastrous financial consequences to its reorganization efforts.

DISCUSSION

Preliminary to any discussion of the merits of the Trustees' motions, is a determination of whether the doctrine of the law of the case affects the Court's determination of any of the issues raised by the present motions. Under the law of the case doctrine, when a rule of law is determined at one stage of a legal proceeding, that rule should govern subsequent stages of the same proceeding. *Al Haddad Bros. Enterprises, Inc. v. M/S Agapi,* 635 F. Supp. 205, 208 (D. Del. 1986), *aff'd,* 813 F.2d 396 (3d Cir. 1987) (citing *Hayman Cash Register Co. v. Sarokin,* 669 F.2d 162, 165 (3d Cir. 1982). The doctrine is, however, "a rule that is subject to the discretion of the court applying it." *Coca-Cola Bottling Co. v. The Coca-Cola Co.* (*Diet Coke VIII*), 1993 WL 40311, *12 (3d Cir. (Del.)). A court's "decision to invoke the law of the case doctrine is discretionary *only* if the doctrine actually applies to the issue before the court." *Id* (*emphasis added*).

The first question to be addressed, therefore, is whether the Court determined in its August 27, 1992 Decision any issue presently before the Court regarding the necessity of filing a Motion for Relief from Stay in order to be entitled to adequate protection pursuant to § 362(d). In its August 27 Decision, the Court made the following statement:

> [T]he Court does not agree that adequate protection may only be sought in conjunction with a lift stay motion. While typically they are brought as alternatives, there is no such explicit requirement in the Code. In fact, the existence of section *363(e)* would imply that adequate protection may be sought independently (emphasis added).

*Matter of Continental Airlines, Inc.*, 146 B.R. 536, 540 (Bankr. D. Del. 1992).

Section 363(e) provides:

> Notwithstanding any other provision of this section, at any time, on request of an entity that has an interest in property used, sold, or leased, or proposed to be used, sold, or leased, . . . the court, with or without a hearing, shall prohibit or condition such use, sale, or lease as is necessary to provide adequate protection of such interest.

Relying on the foregoing provision of § 363(e), this Court concluded that adequate protection may be sought under § 363(e) without filing a lift-stay motion.

The Court's August 27 Decision held that adequate protection may only be awarded from the date movants seek relief. In reaching its determination, the Court relied on the opinion of Chief Judge Lifland that a secured creditor can only receive adequate protection to the extent the collateral declined in value after the secured creditor filed its motion for adequate protection, rather than receiving compensation for all post-petition decline in value. *In re Best Products, Inc.*, 138 B.R. 155, 157 (Bankr. S.D.N.Y. 1992). This Court did not, however, address the specific question of whether a party must file a lift-stay motion in order to receive relief pursuant to § 363(d)(1). Thus, in the instant case, the question remains whether it was necessary for Movants to request relief from the automatic stay in order to be entitled to adequate protection for market value decline caused by the automatic stay.

Section 361 of the Code defines adequate protection:

> When adequate protection is required under section 362, 363, or 364 of this title of an interest of an entity in property, such adequate protection may be provided by –
>
> (1) requiring the trustee to make a cash payment or periodic cash payments to such entity, to the extent that *the stay under section 362 of this title, use, sale, or lease under section 363 of this title*, or any grant of a lien under section 364 of this title results in a decrease in the value of such entity's interest in such property;

In simple terms, § 361(1) provides that adequate protection is available in three contexts: 1) under § 362(d) when the imposition of the automatic stay results in a decrease in the value of an entity's interest in property; 2) under § 363(e) for a decrease in value due to the use, sale, or lease of an entity's interest in property; and 3) under § 364 when a lien is proposed to be granted on the interest of a holder of a previous lien on property.

For purposes of both the first and second adequate protection hearings, the parties agreed to bifurcate the issue of adequate protection for decline in the value of NationsBank's collateral due to use and maintenance factors from the question of adequate protection for market value decline under § 362.

Turning to § 362, the relevant provision states:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a)

> of this section, such as by terminating, annulling, modifying, or conditioning such stay –
>
> > (1) for cause, including the lack of adequate protection of an interest in property of such party in interest;

Read together, sections 361(1) and 362(d)(1) provide that a party in interest shall be granted adequate protection *when the continuation of the automatic stay causes* that party to suffer a decrease in the value of its property interest. In other words, a party can be granted relief from the stay if his interest is not adequately protected; if that request for relief from the stay is not granted, and the value of the collateral is declining, adequate protection may be required. *United Savings v. Timbers of Inwood Forest*, 484 U.S. 365 (1988). Thus, the Code provides for adequate protection as alternative relief to the lifting of the stay pursuant to § 362(d). Accordingly, this Court finds that it is necessary to seek relief from the stay in order for the Court to grant relief either by lifting the stay *or* requiring adequate protection for the decline in the market value of the collateral subsequent to the imposition of the stay. *In re Best Products Co., Inc.,* 138 B.R. at 155. (adequate protection is available to cover a decline in property's value from the time adequate protection is sought).

Based on the forgoing, the Court finds that since Movants did not file a Motion for Relief from Stay until August 14, 1992. Movants are only entitled to adequate protection for any decline in the market value of their collateral from August 14, 1992 forward.

During the nine-day trial, the Court heard credible expert testimony relating to the valuation of the collateral

by John E. Luth, Chief Financial Officer of Continental, Donald C. Benfell, Editor of Avitas Blue Books, and Clive G. Medland of Simat, Helliesen & Eichner (SH&E). Although Mr. Luth, Mr. Benfell and Mr. Medland provided conflicting testimony as to the value of the collateral at various times during the pendency of Debtors' bankruptcy, their appraisals are similar with regard to value of the collateral in August, 1992. Moreover, the three experts are in agreement that there has been no substantial decline in the value of the collateral since August, 1992. Based on this evidence, the Court finds that Movants are not entitled to adequate protection for any decrease in the market value of their collateral. Conversely, since Movants do not suffer from lack of adequate protection under § 362(d), the Court will not grant their request for relief from the automatic stay pursuant to § 362(d)(1).

The remaining question to be addressed is whether Movants are entitled to relief from stay pursuant to § 362(d)(2) because Debtors have no equity in the collateral, and the collateral is not necessary for an effective reorganization. Based on the agreement between the parties that Debtors lack equity in the collateral, this Court need only determine whether the collateral is necessary for an effective reorganization of Continental. Debtors bear the burden of proof on this issue. *Timbers*, 484 U.S. at 376.

The Trustees submit the expert opinion of David H. Treitel of SH&E regarding the necessity of the collateral to Continental's reorganization efforts. Mr. Treitel opines that the collateral is not necessary to a reorganized Continental for several reasons. First, there is an abundance of used aircraft and additional engines available for purchase or lease. Second, Mr. Treitel contends that the lack of

profits in the airline industry reflects an excess seating capacity. Consequently, a return to profitability dictates a reduction in fleet requirements. Finally, Mr. Treitel maintains that federal legislation will require airlines to reduce the number of their aircraft of the collateral type (Stage II) by the end of 1994, and therefore, it would be practical for Continental to abandon the collateral in order to reduce the number of such aircraft in its fleet.

For its part, Continental contends it does not have the financial resources to presently abandon the collateral to the Trustees even if Continental were permitted to do so over a period of six months. According to Continental, substantial portions of the NationsBank collateral are integrated into its fleet, and any disruption to Continental's maintenance and operations programs would significantly impair its reorganization efforts. Debtors maintain that a precipitous reduction in its fleet and seat capacity would negatively impact public confidence and cripple its efforts to increase passenger revenues. Most significantly, Continental maintains that the orderly abandonment of the collateral over a period of time, in conformity with the its Reorganization Plan, is necessary to meet the financial requirements of the Air Partners/Air Canada Investment Agreement. According to the Debtors, the cash available to it at the time its reorganization is consummated will enable Continental to provide for an orderly abandonment and, if necessary, replacement of the collateral.

Although Mr. Treitel's testimony is credible as far as it goes, the Court finds that it does not adequately address the financial constraints of the Debtors. It is the Court's opinion, based on the evidence presented by the parties, that the Debtors have met their burden of showing that the collateral is necessary for an effective reorganization

because any disruption in Debtors' planned schedule of abandonment and replacement of the collateral would have a negative impact on the feasibility of the Continental Reorganization Plan. For this reason, the automatic stay will not be lifted.

CONCLUSION

Based on the foregoing determinations that 1) the Movants were not entitled to adequate protection for market value decline until they filed their lift-stay motion; 2) that the Movants are not entitled to adequate protection from August 14, 1992, to the present and 3) that the collateral is necessary for an effective reorganization of Continental, the Court finds it unnecessary to address the other contentions of the parties regarding the application of the law of the case doctrine and the value of the collateral.

By court-approved stipulation, the parties agreed that the Memorandum, Decision and Order of August 27, 1992 was to be given interim treatment. Having determined that adequate protection for market value decline cannot be provided absent a request for relief from stay, it was unnecessary for this Court to reach the valuation issue in its August 27, 1992 Decision.

An order in accordance with this Memorandum Opinion is attached.

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

| | | |
|---|---|---|
| In the Matter of | : | |
| | : | |
| CONTINENTAL AIRLINES, INC., *et al.*, | : | Case Nos. 90-932 through 90-984 |
| | : | Motion No. 92-258 |
| Debtors. | : | |

ORDER

AND NOW, April 16, 1993, for the reasons stated in the attached Memorandum Opinion,

IT IS ORDERED THAT:

1. The Trustees' Motion for Relief from Stay is DENIED.

2. The Trustees' Motion for Adequate Protection is DENIED.

/s/ Helen S. Balick
JUDGE

## APPENDIX H

Eastern Air Lines Pilots System Board of Adjustment

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| EASTERN AIR LINES, INC. | ) |
| - and - | ) |
| THE AIR LINE PILOTS ASSOCIATION | ) |
| L. D. Schulte Grievance<br>ALPA Case No. 1-86 | ) |

The L. D. Schulte grievance was heard on April 19-21, May 11-12, June 14, and November 15-16, 1988, at Miami, Florida, by the 5-member Pilots System Board of Adjustment composed of Company Members Noel R. Honohan and William R. Tegtman, Association Members J. P. Distel and George T. Jehn (Larry C. Wells sat with the Board in the place of George T. Jehn as Association Member for the June 14 and November 15-16 sessions), and Neutral Referee Frank Elkouri.

Appearing for the Company were David P. Callett, Mark J. Schwartz, and Martin A. Soll, and appearing for the Association was James L. Linsey (Russell Hollander participated in the Association's brief; William A. Roberts appeared for the Association at the November 15 session, and with James L. Linsey at the November 16 session).

Briefs were mailed by both Parties on January 20, 1989 (the Association mailed a corrected brief on January 24).

The Board met at Miami, Florida, on February 7, 1989, for discussion of the case in executive session. It was then understood that the Referee would prepare a proposed decision, and that the Board Members would have two weeks (from the date of the letter transmitting that proposed decision) in which to request another executive session.

The Neutral Referee mailed copies of the proposed decision to the Board Members on March 4, 1989. United States Bankruptcy Court jurisdiction over Eastern Air Lines ensued on March 9, 1989, and on September 11, 1989, that Court authorized the System Board to issue its decision in the present case. No additional executive session was thereafter desired by either Party.

## OPINION BY NEUTRAL REFEREE

A handwritten document hastily drafted by the Company at its bargaining Proposal No. 7 and signed just a few hours later by the Company and ALPA as their agreement under date of February 23, 1986, has been held by the U.S. Court of Appeals, Eleventh Circuit, to constitute in fact a binding collective agreement between Eastern and ALPA in behalf of Eastern's pilots. That document, which hereafter in this Opinion is often referred to as "the February 23 Agreement," contains the language or provision which is now before the Board for interpretation or construction in the present case. In addition to holding the February 23, 1986, document to constitute a binding collective agreement between the Parties, the Court of Appeals held also that the Eastern Air Lines Pilots System Board of Adjustment "will be

charged with determining the contours of" certain disputed provisions contained in the February 23 Agreement (grievances had been filed on the disputed provisions).[1] In the present case one of those disputed provisions is before the Board for final resolution.

In addition to other facts which will be noted in the course of the present Opinion, some of the pertinent facts as found and collated by the Court of Appeals in its decision may be noted now. The Court of Appeals explained that:[2]

> Eastern and its unions together faced a serious dilemma in the early weeks of 1986. Eastern's above-industry labor costs contributed substantially to its deteriorating financial condition, and the airline realized that if it could not reduce those costs by securing wage concessions from ALPA, the machinists' union, and the flight attendants' union, it would be compelled to opt either for bankruptcy or loss of its independence. Neither alternative appealed to Eastern or to its pilots, who were then engaged in rocky negotiations with the carrier over a new collective-bargaining agreement. While an agreement with ALPA alone would not prevent a sale or bankruptcy, the lack of a contract would probably cause one or the other, and would leave the pilots unprotected after such an event occurred. Reaching some sort of agreement was thus of critical importance to both parties.

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[1] *Eastern Air Lines v. Air Pilots Association*, 130 LRRM 2284, 2291 (CA 11, 1988).

[2] *Id.* at 2285-2286.

Collective-bargaining negotiations between Eastern and ALPA, under the eye of the National Mediation Board (NMB), began in December of 1985. In late January 1986, after an impasse, the NMB declared a mandatory thirty-day "cooling off" period under the Railway Labor Act (RLA), after which both the pilots and the carrier could engage in "self-help." Self-help for the pilots entails striking the airline; the airline avails itself of self-help by unilaterally implementing the terms of its final offer. The cooling-off period was to end on February 26.

Intense negotiation continued during the cooling-off period. In the final days of the period, Eastern was approached by a potential suitor, the Texas Air Corporation. Eastern seriously considered accepting Texas Air's offer if it could not resuscitate itself by slashing its labor costs. The offer was due to expire at midnight on February 23, 1986, yet by the 23rd, Eastern and ALPA had not been able to agree to a new contract.

Compounding the external pressure to reach an agreement imposed by the potential of a sale or bankruptcy, the pilots voted on February 21 to strike the airline at the end of the cooling-off period. On February 23, then, the negotiating parties began to work feverishly in the face of the looming deadline, while Texas Air apparently agreed to extend its offer for a few more hours. Wide areas of disagreement still separated the parties.

Sometime in the evening of February 23, ALPA requested Eastern's final offer, and to the ALPA team Eastern offered "EAL No. 7," a

handwritten four-page document peppered with "buzzwords" and loose phrases. The terms of EAL No. 7 summarized concepts that the negotiating parties had been discussing over the course of the talks. After some inconclusive haggling, ALPA negotiators submitted the document to the Eastern Air Lines Master Executive Committee (the "MEC"), ALPA's local governing body, without recommending that the draft be ratified. The MEC questioned its negotiators about various provisions of the document, and the negotiators, aware that they did not completely understand EAL No. 7, were not able to answer every question posed them. The MEC initially rejected EAL No. 7. Then, in the early hours of February 24, informed that it would have to ratify the document or steer Eastern toward bankruptcy or toward a sale, the MEC ratified. Following the ratification, Eastern tendered EAL No. 7 for the signature of the relevant ALPA officials, who then signed the document. Eastern's officials has already signed EAL No. 7. Eastern's Vice President then substituted the word "AGREEMENT" for "PROPOSAL" as the title of the document. On February 25, Eastern and ALPA executed a signature page in blank.

Despite the apparent success in reaching an agreement with ALPA, Eastern was unable to reach an agreement with its machinists' union. Eastern was therefore sold to Texas Air on February 24.

* * *

From the end of February, the parties attempted to flesh out the terse phrases contained in EAL No. 7. As early as February 25,

> if not sooner, the parties realized that certain important terms were unclear. While they never were able to agree on precise definitions for six key terms, other parts of the agreement were not in dispute.
>
> * * *

One of the "key terms" which the Court states the Parties "never were able to agree on precise definitions for," is the February 23 Agreement term which is before the Board in the present case. As quoted by the court from the handwritten February 23 Agreement, this term states: "2. LPP's & Takeover Similar to TWA – need to work out between EAL/ALPA legal counsel".[3] The Court of Appeals specifically indicated that the just-quoted provision is an "unclear term of the February 23 Agreement.[4] The Board now must determine what, under the evidence of record in this case, is the most reasonable construction to be given to this unclear contractual reference to LPP's. At least it is now in order for the Board to make that determination unless the Board finds merit either (1) in the Company's contention that the present grievance "is not ripe for decision," or (2) in the Company's contention that the "grievance is untimely."[5]

Actually, six basic questions or contentions are treated and answered below in this Opinion (but they are not necessarily considered in any particular order). They concern:

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[3] *Id.* at 2286, fn 1.

[4] *Id.* at 2286. Subsequently the Court again acknowledged "the lack of clarity in" the term. *Id.* at 2290.

[5] Co. Brief, pp. 39-40.

1) The Company's contention that the grievance "is not ripe for decision."

2) The Company's contention that the "grievance is untimely."

3) The Company's basic position that the February 23, 1986, Agreement between the Parties provides LPP protection for pilots only as specified in Sections 3 and 13 of the Allegheny-Mohawk LPP's, and that even those Sections "would become effective only if Eastern merged its pilot seniority list with the pilot seniority list of another carrier."

4) ALPA's basic position that the reference to LPP's in the February 23 Agreement incorporates the full package of Allegheny-Mohawk LPP's.

5) ALPA's position in the alternative that if the claim to the full package of Allegheny-Mohawk LPP's is rejected, then the Eastern pilots are entitled to "all of the protections of the TWA LPP's."

6) The question of what is the most reasonable construction of the reference to LPP's in the February 23 Agreement if the contentions of ALPA and the Company concerning that reference are all rejected.

Regarding the Company contention that the grievance "is not ripe for decision," the Company urges that a ruling on the merits of the grievance would constitute

an advisory opinion or declaratory judgment. The Company explains:[6]

> "Assuming *arguendo* that ALPA is correct and that the parties agreed to Allegheny-Mohawk LPP's, there is, nevertheless, no dispute for this Board to decide. Allegheny-Mohawk LPP's provide protections and compensation for employees affected by the merger of two airlines. Thus, unless Eastern has merged with another carrier, the issue presented by ALPA's grievance is not ripe for decision. As the Chairman observed, it is not within the Board's jurisdiction to determine [in the present case] whether there has been a merger between Eastern and another airline. Accepting this, and the fact that Eastern has not announced a merger with another airline and that no administrative or judicial body has concluded that such a merger has taken place, no employee can argue that he has been affected by a merger. Therefore, the controversy before the board is not ripe."

Even though the question whether there actually has been any merger is not before the Board in the present case, the Board's ruling on the merits in the case will not constitute merely an advisory opinion or declaratory judgment. An important issue is properly before the Board and is ripe for decision on the merits. That issue concerns the scope of LPP protection to which the pilots are entitled as a matter of contractual right and the concomitant scope of Company LPP obligation under the Fegruary [sic] 23 Agreement.

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[6] Ibid, footnote and citation omitted. Also see Co. Brief, p. 4.

The grievance in the present case is dated August 6, 1986, and contains the following statement as to what is alleged:[7]

> "[T]he undersigned hereby files this MEC grievance based on the Company's disclosure that it will refuse to recognize 'standard' Labor Protective Provisions (Allegheny-Mohawk) as provided in the current EAL/ALPA Agreement dated February 23, 1986."

The Company's belief that the grievance is not ripe for decision by the Board possibly has resulted in part at least from the Company's unduly narrow view regarding what the grievance statement inherently seeks. In this connection, one of the Company's contentions in this case is that "The scope of ALPA's grievance is limited and ALPA should not be permitted to expand the scope of its grievance."[8] The Company urges that, if the Board does rule on the merit "The Board should limit its ruling to the question which ALPA's grievance raises: whether, in the February 23, 1986 Agreement, the parties agreed to Allegheny-Mohawk LPP's."[9] Although the grievance statement does call, of course, for an affirmative or negative answer to the question whether the parties agreed to the Allegheny-Mohawk LPP's, the grievance statement inherently seeks more than that.[10] The fact

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[7] Joint Ex. #1, Submission Ex. # 1.

[8] Company Brief, p. 37.

[9] *Id.* at 39.

[10] Even if the grievance statement did only seek a ruling on the question whether the Parties, in the February 23 Agreement, agreed to the Allegheny-Mohawk LPP's, the case arguably would still be ripe for decision. This is so because knowing whether they have a contractual right to the full package of Allegheny-Mohawk LPP's is of such obvious

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that the grievance statement does inherently seek more is relevant not only to the Company's contention that ALPA has attempted to expand the scope of its grievance, but is relevant also to the contention that the grievance is not ripe for decision.

In substance and import, if not in literal words, the grievance asserts: (1) the right of pilots to know the general scope of LPP protection they have as a matter of contractual right under the February 23 Agreement; (2) the right of pilots to insist that the Company likewise be cognizant of the general scope of LPP protection and the concomitant Company LPP obligation, so the Company may be prepared to fulfill the obligation as it may become due consequent to future developments; and (3) the right of pilots to insist that the Company not deny the existence of pilot LPP protection of the general scope that actually exists under the February 23 Agreement.

One of the very important benefits inherent in some types of rights comes from merely knowing, without more, that the rights are there. Few understanding persons would deny that an exceedingly important benefit which comes from having life insurance, for example, is the assurance and peace of mind that comes merely from knowing that it is there. LPP's could be considered in a sense, to be a type of life or casualty insurance. But in any event, LPP's are definitely insurance of some type. The pilots are entitled to know whether they have contractual LPP's; and if they do have LPP's, the pilots are entitled to know what contractual

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and great important to the pilots that it would be unreasonable to deny them the answer until a merger has occurred or allegedly occurred.

provisions will apply to control the scope of that protection. Moreover, the pilots are entitled, as a matter of right, to insist that the Company also know these things to enable it to evaluate its contractual LPP obligation. This is essential for the sound managerial planning and decisions critical to the fulfillment of pilot LPP protection.

Thus, the present grievance must be considered ripe for decision. Or at least this is so unless any decision concerning the general scope of LPP's under the February 23 Agreement would be too speculative at this time. It would not be too speculative. Information for resolving the grievance is as much available and as adequate now as it would be later. A ruling on the merits will be no more speculative now than it would be later. The contention that the grievance "is not ripe for decision" is rejected. And as now will be explained, the contention that the "grievance is untimely," is also rejected.

Much of what has been said above concerning the "not ripe for decision" contention, is relevant also to the contention that the "grievance is untimely." That is, the right of pilots to know the general scope of their contractual LPP protection, and their right to insist that the Company likewise know, and their right to insist that the Company not deny the existence or general scope of the contractual LPP protection, are all continuing rights: each and every day that these rights are denied to the pilots by the company, their right to protest by grievance arises anew.[11]

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[11] ALPA, too, believes the case involves a continuing violation, but ALPA states a different rationale for the belief. ALPA Brief, pp. 19-21.

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But even apart from the fact that the grievance by nature involves a continuing violation, another consideration in rejecting the contention that the grievance is untimely, is the fact that discussions in LPP's were ongoing between the Parties through the spring and much of the summer of 1986. In the latter regard, ALPA states:[12]

> "ALPA first learned that Eastern had foreclosed any possibility of providing Allegheny-Mohawk LPP's on July 10, 1986, when Eastern amended its complaint [in its court action] to assert that no valid collective bargaining agreement between ALPA and Eastern existed. Prior to that time ALPA and Eastern had been discussing ways to resolve their differing interpretations of the contractual language including, but not limited to, LPP's. These discussions occurred on an ongoing basis from February up to and including July. It was not until July 10, 1986 when Eastern asserted that no valid collective bargaining agreement existed that ALPA realized those discussions were futile. ALPA promptly filed the present grievance on August 6, 1986 well within the 45 day time limit prescribed by Section 30 of the ALPA-Eastern Collective Bargaining Agreement.
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> "In similar circumstances, arbitrators have found that the time limit to file a grievance does not begin to run until informal attempts to resolve the dispute break down. [ALPA's

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Since the rationale stated hereinabove shows that a continuing violation is involved, the rationale stated in ALPA's Brief is not evaluated here.

[12] ALPA Brief, pp. 17-18, Transcript citations omitted.

> footnote here states, with support by a Transcript citation, that "This is entirely consistent with the parties practices at Eastern."] These decisions reason that so long as there may be a chance to resolve the dispute short of the formal arbitration process, informal discussions should be encouraged."

Both in its Brief in the present case and in its position in the court action, the Company itself has affirmed that there were ongoing discussions between the Parties on LPP's and other key issues at least until August 1986.[13]

The Company denies that the ongoing discussions had the effect of tolling the running of contractual time limits. The Company declares that "at no point in these discussions was there an agreement to extend the 45-day time limits and Eastern never gave any indication that it would change its position on LPP's."[14] But neither did the Company give any indication that it would not change its position on LPP's; until the Company renounced

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[13] Company Brief, p. 43, referring to "the discussions held by the parties from March through July 1986"; *Eastern Air Lines v. Air Line Pilots Association*, 130 LRRM 2284, 2286 (CA 11, 1988), where the Court stated: "In August, ALPA attempted to invoke adjustment-board procedures to resolve three more disputes under EAL No. 7, concerning the 'labor protective' term, medical and dental benefits, and 'pseudo' contributions to the pilots' retirement plan. In September, Eastern again amended its complaint, and alleged that

> Contrary to the assertions of [ALPA], no agreement presently exists between ALPA and Eastern with respect to any of the matters referred to above. On the contrary, *these* and other *matters have been the subject of ongoing*, but to date unsuccessful collective bargaining *negotiations* * * * ." (emphasis added)

[14] Company Brief, p. 43.

the Agreement to the court, it had never given clear notice that the ongoing discussions and the possibility of settlement of the LPP issue was ended. Although the waiver of contractual time limits should not be lightly implied, a specific and express understanding by the Parties is not the only possible basis for tolling their running (unless the contract expressly provides otherwise). As stated herein-above, another consideration in rejecting the contention that the present grievance is untimely, is that there were ongoing discussions between the Parties on LPP's.

Turning now to the merits of the grievance, the Board must determine what, under the evidence of record in this case, is the most reasonable construction to be given to the reference to LPP's in the February 23 Agreement. As we have noted, that reference is contained in the following portion of the Agreement: "2. LPP's & Takeover Similar to TWA – need to work out between EAL/ALPA legal counsel".

The following statement by the Company indicates the basic position it has taken as to the meaning or significance of the reference to LPP's in the February 23 Agreement:[15]

> "The contested language 'LPP's & Takeover Similar to TWA' is clear and unambiguous. The language is susceptible to only one interpretation – Eastern proposed and ALPA agreed to

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[15] Co. Brief, p. 2, emphasis added. Co. Brief, p. 16, again asserts the limitation that pilot seniority rights would be protected by Sections 3 and 13 only "in the event there were a merger of" seniority lists.

> TWA LPP's (Sections 3 and 13 of the Allegheny-Mohawks LPP's), *which would become effective only if Eastern merged its pilot seniority list with the pilot seniority list of another carrier.*"

Another statement by the Company reflects its understanding regarding ALPA's position in the case:[16]

> "The disputed language 'LPP's & Takeover Similar to TWA' is clear and unambiguous. Interestingly, both Eastern and ALPA agree on this. Yet the parties believe that the disputed language has a different meaning. ALPA reads the language as if there is a period after the acronym 'LPP's' and the phrase 'Similar to TWA' modifies only the word 'Takeover' and not the acronym 'LPP's.' ALPA contends that the acronym 'LPP's' standing alone can only refer to Allegheny-Mohawk LPP's."

That Alpha in fact does read the disputed language as if there is a period after the term "LPP's," making it much more certain that the term does stand alone, seems implicit in ALPA's own statement of its basic position, which is "that the pilots bargained for and received standard, i.e. Allegheny-Mohawk, LPP's."[17]

It is not necessary for the Board to decide in the present case whether the term or acronym "LPP's" should be treated as standing alone, or whether it should be treated as being modified by the words "Similar to TWA." This is so because its meaning would be

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[16] Co. Brief, pp. 14-15, footnote omitted.

[17] ALPA Brief, p. 1. in claiming "standard" or "Allegheny-Mohawk LPP's," ALPA means the full package of Allegheny-Mohawk LPP's.

uncertain in either event. Whether the term is viewed as standing alone, or as being modified, either way the Board still would be forced to rely upon bargaining history and/or other extrinsic evidence in order to determine what is the general scope of LPP protection to which the pilots are entitled as a matter of contractual right under the reference to LPP's in the February 23 Agreement. Standing alone, the term "LPP's" is too general to be clear and certain – while the Allegheny-Mohawk LPP's promulgated by the Civil Aeronautics Board initially may have been the only known type of LPP's, other varieties subsequently did come into use. And if the term "LPP's" were viewed as being modified by the words "Similar to TWA" in the February 23 Agreement, the general scope of LPP protection under that Agreement still would be uncertain – to be "similar to" is not the same as being "identical with." But even if "similar to" were considered to be the same as "identical with," that might not provide any easy or automatic answer. It might be difficult to apply for Eastern pilots LPP's identical with all of the LPP's to which TWA pilots are entitled under the January 3, 1986, letter of understanding between ALPA, Trans World Airlines, and Carl C. Icahn and his affiliates (the letter of understanding is referred to elsewhere in this Opinion as the "TWA Agreement").[18] In the latter regard, the TWA LPP's do not appear to be so readily adaptible as the

[18] The letter of understanding was introduced into evidence in the present case as ALPA Exhibit #4.

Allegheny-Mohawk LPP's for use in mergers between other carriers.[19]

Nothwithstanding any difficulty that may be involved in an attempt to use the TWA LPP's in toto for Eastern's pilots, ALPA does request in its Brief (p. 36) that the Board "order Eastern to recognize and abide by

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[19] Unlike the package of LPP's contained in the TWA Agreement, the Allegheny Mohawk LPP's are stated in such terms as to be usable with little or no modification for other airline mergers. The Allegheny-Mohawk LPP's in fact were imposed by the Civil Aeronautics Board for other airline merger with the result that they sometimes are referred to as "standard" LPP's. In the latter regard, the U.S. Department of Transportation, in a case related to the present case, explained on January 9, 1989, that:

> "The standard LPP's sought by the labor parties are those drafted by the Civil Aeronautics Board * * * in *Allegheny-Mohawk Merger*, 59 CAB 22, 45-49 (1972), and applied by the Board in later cases with virtually no changes. The standard LPP's would provide financial benefits for employees whose jobs were lost, displaced, or moved as a result of the transaction and would require a fair integration of the carriers' seniority lists." Remanded Texas Air-Eastern Acquisition Case, Docket 44346, Final Order 89-1-11, P. 2 fn. (DOT, 1989).

In the latter Order (at 15-16) the DOT denied "the requests that standard labor protective provisions be imposed"; instead, the DOT "as a condition upon the approval * * * of Texas Air Corporation's acquisition of Eastern Air Lines," imposed a stipulation by Texas Air Corporation and Eastern Air Lines that certain possible future events would not extinguish "the labor Protective Provisions which may be contained in any Eastern Air Lines collective bargaining agreement." For more on this, see ALPA Brief, pp. 3-4, where ALPA also explains, to this Board, that: "ALPA's simultaneous pursuit of Government-ordered LPP's is not inconsistent with its position that standard LPP's are included in the February Agreement. Indeed, ALPA may feel much more secure cloaked with a Government order policed by the United States than with provisions of a collective bargaining agreement which was challenged in lengthy litigation by Eastern."

standard LPP's in the February Agreement. In the alternative, this System Board should order Eastern to recognize and abide by all of the protections of the TWA LPP's in its February Agreement." In this regard, ALPA in its Brief (p. 35) expresses its belief that:

> "The TWA Agreement, while somewhat different from standard Allegheny-Mohawk LPP's, provides genuine protections through the preservation of assets and by other controls. * * * Paragraph 10 of the TWA Agreement specifically provides for the preservation of TWA's aircraft fleet and level of operations, prohibits the full or partial merger of the airline without the consent of ALPA, and attaches as Appendix B thereto Sections 1, 2, 3, and 13 of Allegheny-Mohawk LPP's. * * *
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> "In the negotiations leading to the February Agreement, Eastern made no reference at all to any LPP provisions in the TWA Agreement * * * much less initiated any discussion to delete or modify those provisions. Therefore, if Eastern persists in its argument that it agreed to LPP's similar to TWA, this Board should closely examine paragraph 10 and related provisions of the TWA Agreement and treat Eastern to what it requests and so richly deserves: labor protective provisions, including fleet asset and operational level guarantees and merger restrictions, which approximate those contained in paragraph 10 and related provisions of the TWA Agreement."

However, even apart from any other consideration standing against acceptance of ALPA's request in the alternative for "all of the protections of the TWA LPP's," a sufficient reason for rejecting such a request is that

the record in the present case offers virtually no indication, if any at all, that *either* Eastern or ALPA actually had even the slightest thought of incorporating all of the TWA Agreement LPP's into the February 23 Agreement. An order by this Board for such a result would in no sense be the most reasonable construction which could be given to the reference to LPP's in that Agreement – any such order would deviate much too far from the intent or expectation of either Party when the February 23 Agreement was adopted.

But neither does the record in this case justify any conclusion that the reference to LPP's in the February 23 Agreement entitles the pilots to the full package of Allegheny-Mohawk LPP's.

Space will not be devoted in the present Opinion to a detailed discussion of the evidence that has been submitted by the Company to show that the pilots knew or should be charged with notice that the Company is entering into the February 23 Agreement believed and expected that something considerably less than the full package of Allegheny-Mohawk LPP's was being contracted for. Rather, it suffices to state here that the Company in its Brief, with ample citation of evidence contained in the Transcript and Exhibits, has discussed that evidence and has indeed shown that the pilots knew or should be charged with notice that the company intended and believed that something considerably less than full Allegheny-Mohawk LPP's was being contracted for.[20]

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[20] See Co. Brief, pp. 3, 5-10, 12-13, 21, 26. Also see Tr 316-317, 324, 326-327. Moreover, it is difficult to refute the Company's argument

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Two factors that the Company places special reliance upon in the latter regard, are (1) that "ALPA's President, Henry Duffy, who signed both the TWA [A]greement and the Eastern Agreement, was present when Eastern's LPP proposal was made and at the MEC meeting which approved the proposal," and (2) that "Seth Rosen, ALPA's Director of Representation, brought the TWA LPP's to the attention of Alan Gibson, the Chairman of Eastern's Negotiating Committee."[21] Concerning the latter factor, the Company states that:[22]

> "After presenting copies of Eastern's Proposal No. 7 to ALPA's negotiators, Mr. Gibson read the language of that proposal and asked ALPA's negotiators if they had any questions. Receiving none, he assumed ALPA's negotiators understood Eastern's proposal. Mr. Gibson's assumption was clearly reasonable, because seated across the table was Mr. Bradley, who in conjunction with Mr. Rosen had first informed Mr. Gibson about TWA LPP's, suggesting that these limited LPP's could be the basis for an agreement between Eastern and ALPA on LPP's. Mr. Gibson knew that Messrs. Rosen and Bradley had advised him that TWA LPP's, Sections 3 and 13 of Allegheny-Mohawk LPP's, were the heart of the

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that: "Considering Eastern's dire financial condition on February 23, 1986, and the general concessionary nature of the Eastern's contract proposals (including a 20% pay reduction for pilots) it is inconceivable that Eastern would propose, or ALPA believed that Eastern was proposing the high-cost Allegheny-Mohawk LPP's." Id. at 31. This Company argument has at least some merit – it cannot be totally discounted or rejected by the Board.

[21] Co. Brief, p. 3.

[22] Co. Brief, pp. 25-26, Transcript citations omitted.

TWA agreement and that proposing these sections might serve to break the deadlock between the parties on LPP's."

ALPA's Director of Representation, Seth Rosen, testified on cross-examination before the Board (Tr 1023):

"Q. You did tell him [Gibson], did you not, that Sections 3 and 13 of the Allegheny-Mohawk LPP's was the heart of the LPP's?

"A. When I gave him the copy of the LPP's I told him he should look at 3 and 13 because they cover seniority integration.

"Q. I think you used the words 3 and 13 are the heart?

"A. From my perspective, because they control seniority. From my perspective they are the heart."

In turn, ALPA explains in its Brief (p. 11) that:

"Mr. Rosen was not authorized by the Negotiating Committee to negotiate for the Eastern pilots but was authorized to go (with John Bradley) see representatives of Eastern * * * . The purpose of that meeting was 'to ascertain exactly what the status of negotiations were, to try to get a picture of where we were. That was basically listening to the Company on their so-called open issues.' Tr. 1006 (Rosen). Precisely what happened at Mr. Ussery's office is disputed: Mr. Gibson alleges that Mr. Rosen indicated that while they would like full Allegheny-Mohawk LPP's, ALPA would be willing to settle for TWA LPP's and pointed to only sections

> 3 and 13 of Allegheny-Mohawk LPP's, Tr. 825, 946-48, 959 (Gibson); Mr. Rosen strenuously denies this and testified that he gave Mr. Gibson the complete Allegheny-Mohawk LPP document at this point, stressed ALPA's interest in triggers, and told him to look at the TWA Agreement (without isolating the LPP's). Tr. 1006-09, 1025 (Rosen)."

Thus, it is undisputed at least that although Rosen was not authorized to negotiate for the Eastern pilots (Gibson has in fact acknowledged that Rosen did not negotiate), Rosen *was authorized* to talk with Company Officials and he did direct them to the TWA Agreement. Director of Representation Rosen testified that the purpose of this meeting was "to see if there was any way to get the negotiating process started because it * * * had been stymied" (Tr 1020), and that he "made general reference to the fact [that ALPA] had reached an agreement at TWA, including a wrap around agreement, with Carl Icahn, and they contained some language that should be looked at" (Tr 999). ALPA has not denied the validity of this testimony. Certainly, by implied ratification, if not otherwise (as by prior express authorization), Rosen was the authorized agent of the Pilot Negotiating Committee.[23]

Even assuming *arguendo* that the ALPA Negotiating Committee was not fully informed regarding all that had transpired in the discussions between Rosen, Bradley, Gibson, and Ussery, knowledge of the above-noted words

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[23] Also relevant in this regard is the fact that Rosen promptly met with the ALPA Negotiating Committee to brief them as to "generally what we had discussed." Tr 1010.

and actions of Director of Representation Rosen in those discussions (and also the resultant knowledge that thereafter the Company in using the acronym "LPP's," might be thinking in terms of TWA LPP's, or at least might not be thinking exclusively in terms of Allegheny-Mohawk LPP's), *must be imputed to* the ALPA Negotiating Committee:

> "'It is the general rule, settled by an unbroken current of authority, that notice to, or knowledge of, an agent while acting within the scope of his authority and in reference to a matter over which his authority extends, is notice to, or knowledge of, the principal.'
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> * * *
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> "The fact that the knowledge of or notice to the agent was not actually communicated to his employer will not prevent the operation of the general rule that the master-principal is chargeable with such knowledge or notice."[24]

Moreover, another possible basis for charging the pilot representatives with notice that Eastern Proposal No. 7 might not be intended to give the pilots full Allegheny-Mohawk LPP's, would be application of the "constructive notice" concept: "*Constructive notice* exists when the party, by any circumstance whatever, is put upon inquiry * * *."[25] The Company has pointed to various circumstances calling for inquiry and which likely would have led to inquiry had

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[24] Ferson, Principles of Agency, § 100 (1954), quoting Mechem, Agency, 2d ed.

[25] Bouvier's Law Dictionary, 3rd ed. § 1803.

the pilots' desire to obtain an agreement on February 23, 1986, not been so urgent.[26]

As noted above in the quotation from ALPA's Brief, the testimony of Gibson and that of Rosen differs dramatically as to whether Rosen stated that ALPA would like Allegheny-Mohawk but could live with the TWA LPP's, and stated that the TWA LP's were Allegheny-Mohawk Sections 3 and 13.[27] Without attempting to reach any conclusion as to which version is accurate, it is clear enough that regardless of what Rosen's words actually were in the course of his discussions with Gibson and Ussery, and regardless of what might have been Rosen's actual intent, the message that Gibson actually received from the discussions was that something less than the full package of Allegheny-Mohawk LPP's would at least be considered by ALPA – and that, in particular, Sections 3 and 13 of the Allegheny-Mohawk LPP's possibly could be the LPP protection to be adopted.

Upon weighing all of the evidence relating to ALPA's claim to full Allegheny-Mohawk LPP's, it cannot reasonably be concluded that the reference to LPP's in the February 23 Agreement entitles the pilots to the full package of Allegheny-Mohawk LPP's.

But can the Company's basic position in this case be considered to be the most reasonable construction of the February 23 Agreement's reference to LPP's? As previously noted, the Company's basic position is that the

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[26] Company Brief, pp. 12-13. Also regarding cause for inquiry, see Tr 316-317, 324, 326-327.

[27] For some of their conflicting testimony on this see Tr 948, 959 (Gibson) Tr 1009 (Rosen).

February 23 Agreement's reference to LPP's incorporates "Sections 3 and 13 of the Allegheny-Mohawk LPP's," but "which would become effective only if Eastern merged its pilot seniority list with the pilot seniority list of another carrier."

On the morning of February 23, 1986, the Company's then Chairman of the Board of Directors and CEO, Colonel Frank Borman, requested that he meet alone with the ALPA negotiating Committee. ALPA negotiators have testified literally or in substance that in that meeting Colonel Borman made a commitment that LPP's were "not a problem" and that the pilots were entitled to them.[28] The Company states in this regard:

> "Colonel Borman met with the pilots to add urgency to the need for an agreement. He did not meet with the pilots to negotiate, and he struck no private deals with the pilots. Although ALPA attempts to make much of their private meeting with Colonel Borman, ALPA's negotiators did not 'use the term Allegheny-Mohawk, [or] Standard LPP's' at any time during that meeting. Even if this Board is to credit ALPA's witnesses' assertions that Colonel Borman said that LPP's 'were not a problem', that does not establish that Colonel Borman meant Allegheny-Mohawk LPP's. This is particularly true because [ALPA negotiator] Christy advised Colonel Borman that the pilots '. . . [were] concerned about seniority . . . '"[29]

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[28] ALPA Brief, pp. 13-14; Tr 76, 247, 332-333 (Tully testimony); Tr 657, 660-661 (Loomos testimony).

[29] Company Brief, p. 22, citations of Transcript and Exhibits omitted. It may be noted that ALPA Negotiating Committee Chairman Tully testified as follows on cross-examination (Tr 246-247):

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ALPA's evidence in this case is not sufficient to establish that Colonel Borman made a commitment to the pilots to grant the full package of Allegheny-Mohawk LPP's; and this is particularly so in view of the fact that neither the term "Allegheny-Mohawk" not even the word "standard" was contained in any of ALPA's written proposals from the commencement of negotiations in early December 1985 until negotiations culminated with the signing of the February 23 Agreement.[30] Also, as far as

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"Q. If I remember your testimony on direct it was that you said that you wanted LPP's and Colonel Borman said he didn't have a problem with that. Is that a fair characterization of your testimony?

"A. That is correct * * *

"Q. You never said well, we want Allegheny-Mohawk LPP's did you?

"A. We didn't use the term Allegheny-Mohawk, Standard LPP's."

But regarding ALPA Negotiating Committee meetings with the Eastern Negotiating Committee (Borman not present), Tully testified that the ALPA Negotiating Committee did speak of "Standard Labor Protective Provisions, and that "perhaps" some ALPA negotiator "may have used Allegheny-Mohawk." But Tully also testified that it "may not have been used." Tr 184.

[30] The negotiations which resulted in the February 23 Agreement commenced in early December and the Company tendered the first proposal, after which ALPA made its first proposal. Tr 52 (Tully). "LPP's were first proposed by ALPA's Negotiating Committee on January 17, 1986 with delivery of ALPA Proposal No. 4 * * * [which] concluded as follows: * * * ALPA is proposing that the amended agreement provide for LPP's." ALPA Brief, pp. 8-9. Reference to LPP's in later ALPA proposals similarly used merely the general term "LPP's." In the latter regard, the Company observes that "The October 6, 1985 letter from Mr. Schulte to Colonel Borman demonstrates that ALPA is capable of clearly proposing Allegheny-Mohawk LPP's," Schulte having explained in the letter that "The Labor Protective Provisions that were imposed in the Allegheny-Mohawk merger are the ones that I propose should be used to protect our pilots * * *."

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notice to Borman from ALPA otherwise is concerned, it appears to be more likely that only the general term "LPP's" was brought to his attention (see Footnote 29, above). And since Gibson and Ussery understandably may have been thinking in terms of LPP's significantly less beneficial to the pilots than the full package of Allegheny-Mohawk LPP's, notice cannot reasonably be imputed to Borman through Gibson and Ussery that the pilots were thinking only in terms of the full package of Allegheny-Mohawk LPP's.[31]

But notwithstanding the foregoing considerations, and notwithstanding Colonel Borman's assertion by deposition

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Company Brief, p. 21 fn 15. That letter from Schulte (MEC Chairman and grievant in the present case) is in evidence as ALPA Ex. #6. On the Company's part, the only reference at all to LPP's in any of the Company's written proposals made at any time in the course of the negotiations which commenced in December 1985 and culminated with the signing of the February 23 Agreement, was that contained in Company Proposal No. 7, which is now before the Board for construction. See Tr 87. Even in oral discussions between the Eastern and ALPA Negotiating Committees, while the word "standard" sometimes was used by ALPA, the term "Allegheny-Mohawk" may not have been used at all. See Footnote 29, above; ALPA Brief, p. 6; Company Brief, p. 21.

[31] Regarding *actual* notice to or knowledge by Borman during the negotiations which culminated in the February 23 Agreement, the record in this case does not reveal what might have been his actual understanding or thoughts concerning LPP's. As previously stated, the term "LPP's" standing alone is too general to be clear and certain as to scope. The ALPA Negotiating Committee only asserts its use of the general term when Borman met alone with the Committee. See Footnote 29, above. And on the Company's side, Gibson testified that he did not talk to Borman about LPP's. Tr. 908. Thus, Borman's actual understanding or intent concerning LPP's, whatever it was, should not be a factor in the decision in this case. However, as stated below, an important factor is that one of the messages which the ALPA Negotiating Committee actually received from Borman was that the pilots could expect meaningful contractual protection from LPP's.

that he did not meet with the ALPA Negotiating Committee to negotiate,[32] the strong testimony by ALPA witnesses (who testified in person before the Board and were subjected to cross-examination) sufficiently establishes that regardless of what Borman's words actually were during his February 23, 1986, meeting with the ALPA Negotiating Committee and regardless of what might have been his actual intent at that time, one of the messages which the Committee actually received from him as Company CEO was that the pilots could expect LPP's which would provide meaningful protection as a matter of contractual right.

Is the Company now acknowledging meaningful protection? Could the pilots reasonably be expected to get any real sense of security or peace of mind from the Company's basic position in this case? Certainly the pilots reasonably could question whether they would have meaningful LPP protection as a matter of contractual right if the board were to accept the Company's position that although Sections 3 and 13 have been incorporated into the February 23 Agreement, they shall "become effective only if Eastern merged its pilot seniority list with the pilot seniority list of another carrier."

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[32] Borman's deposition, given in connection with court proceedings, contains no apparent reference to LPP's, but he did deny that he negotiated with the ALPA Negotiating Committee when they met alone. Company Ex. #18, pp. 46, 50-51. The Company states that after the meeting Borman disclaimed also having made any deal with the Committee. Company Brief, pp. 22-23, citing testimony by Gibson. Because Borman did not appear before the Board to give testimony, it was nor possible to question him on what he might have said on the subject of LPP's.

ALPA declares that meaningful LPP protection "becomes illusory" under the Company's construction of the reference to LPP's in the February 23 Agreement,[33] and ALPA explains its view of "meaningful" LPP protection:[34]

> "Meaningful protection under standard LPP's was and is of grave concern to the Eastern pilots. In addition to certain pecuniary allowances under standard Allegheny-Mohawk LPP's [a footnote here refers to 'displacement allowances, dismissal allowances, real estate claims, etc.'], genuine job security derives in large part from preserving the separate integrity of assets and operations of the merging carriers until a fair and reasonable seniority integration of labor groups is accomplished. Thus, standard LPP's provide triggers for the immediate integration of labor groups once the separate integrity of assets and operations is disturbed. [Here ALPA cites Allegheny-Mohawk Section 2(a) as broadly defining 'merger' to mean joint action by the two carriers whereby they 'unify, consolidate, merge, or pool in whole or in part their separate airline facilities or any of the operations or services', Section 3 as triggering seniority integration immediately insofar as the merger affects seniority rights, and Section 13 as providing for expedited arbitration of seniority integration.] Such Allegheny-Mohawk seniority integration triggers, coupled with liabilities from pecuniary allowances, are the heart of meaningful protection * * *."

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[33] ALPA Brief, p.1.

[34] ALPA Brief, p. 26.

As the just-quoted ALPA statement indicates or at least implies, Allegheny-Mohawk Section 3 has its own "trigger." And ALPA also is correct in asserting that meaningful LPP protection "becomes illusory" under the Company's position in the present case. In substance if not in words, the Company position is that:

> The February 23 Agreement does not incorporate the full package of Allegheny-Mohawk LPP's; but it does incorporate Allegheny-Mohawk Sections 3 and 13 except as they are modified by the following facts or alleged facts:
>
> (a) The TWA Agreement substitutes a different "trigger" for Allegheny-Mohawk Section 3;
>
> (b) The "trigger" under the TWA Agreement is that there must have been a decision by a management that seniority lists shall be integrated; and
>
> (c) In adopting the February 23 Agreement the Parties adopted the TWA Agreement trigger making a management decision to integrate seniority lists a condition precedent to the applicability of anything contained in Allegheny-Mohawk section 3.

It will be recalled that the following statement was made earlier in this Opinion: "Upon weighing all of the evidence relating to ALPA's claim to full Allegheny-Mohawk LPP's, it cannot reasonably be concluded that the reference to LPP's in the February 23 Agreement entitles the pilots to the full package of Allegheny-Mohawk LPP's." Now it must be stated, more specifically, that the evidence in the present case does not sustain ALPA's contention

that the pecuniary allowances provided in the Allegheny-Mohawk LPP's may be asserted, in addition to the protection of sections 3 and 13, as a matter of contractual right by Eastern's pilots. But even without the pecuniary allowances, as desirable as they may be, the protection of seniority itself by application of Sections 3 and 13 is of such critical importance that this without more does constitute meaningful protection under the February 23 Agreement. The latter belief or conclusion would hold as well even without the support of ALPA Director of Representation Rosen's testimony that Sections 3 and 13 are the "heart" of the Allegheny-Mohawk LPP's "because they control seniority." But Rosen's words do state it very well.

Before further comment is made regarding Sections 3 and 13 of the Allegheny-Mohawk LPP's, those important Sections are quoted now in full:

> "Section 3. Insofar as the merger affects the seniority rights of the carriers' employees, provisions shall be made for the integration of seniority lists in a fair and equitable manner, including, where applicable, agreement through collective bargaining between the carriers and the representatives of the employees affected. In the event of failure to agree, the dispute may be submitted by either party for adjustment in accordance with section 13.
>
> "Section 13(a). In the event that any dispute or controversy (except as to matters arising under section 9) arises with respect to the protections provided herein, which cannot be settled by the parties within 20 days after the controversy arises, it may be referred by any party to an arbitrator selected from a panel of seven names furnished by the National Mediation Board for

consideration and determination. The parties shall select the arbitrator from such panel by alternatively striking names until only one remains, and he shall serve as arbitrator. Expedited hearings and decisions will be expected, and a decision shall be rendered within 90 days after the controversy arises, unless an extension of time is mutually agreeable to all parties. The salary and expenses of the arbitrator shall be borne equally by the carrier and (i) the organization or organizations representing the employee or employees or (ii) if unrepresented, the employee or employees or group or groups of employees. The decision of the arbitrator shall be final and binding on the parties.

"(b) The above condition shall not apply if the parties by mutual agreement determine that an alternative method for dispute settlement or an alternative procedure for selection of an arbitrator is appropriate in their particular dispute. No party shall be excused from complying with the above condition by reason of having suggested an alternative method or procedure, unless and until that alternative method or procedure shall have been agreed to by all the parties."

Under the Company's position, Sections 3 and 13 would not in reality be the controlling factor as concerns seniority. Rather, Company discretion or freedom of choice would be the controlling factor. In any event, if the Company's position regarding applicability of the TWA trigger were accepted by the Board in the present case, then as long as any reasonable possibility might continue to exist that the TWA trigger ultimately would be construed to require a management decision to integrate seniority lists

as a condition precedent to the protection of Sections 3 and 13, doubt would remain as to whether the pilots would in fact have any meaningful protection.[35]

In light of various considerations discussed hereinabove, the Board should not issue any award in this case which is not definitely intended and calculated to recognize meaningful LPP protection for pilots as a matter of contractual right under the February 23 Agreement. Nor need the Board do so, for Allegheny-Mohawk Section 3 has its own "trigger." That trigger inheres in the Section 3

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[35] A contention that management would have discretion, under the TWA Agreement, to decide whether or not there will be any integration of seniority lists would in no sense be frivolous. In the latter regard, note that Paragraph 10 of the TWA Agreement provides (ALPA Ex. #4, pp. 7-9) that "if TWA, New TWA or the Icahn Group acquires" control of another airline, then by (b)(iii):

> "Section 3 and Section 13 (as it relates to Section 3 alone and to the extent it may be invoked by the airline or the pilots' collective bargaining representatives alone) of the AAA-MOH LPPs, dealing with integration of seniority lists, shall be provided to the TWA Airline pilots in the event of any full or partial merger of the pilot seniority lists of the TWA Airline and the Acquired airline."

One entirely rational interpretation of the just-quoted provision would be that only the carrier (or possibly the carrier in conjunction with the pilot bargaining representative but in no case the latter alone) may decide *whether* under Section 3 there is to be any integration of seniority lists, but *if* it is decided that seniority lists shall be integrated, then either the carrier or the pilot bargaining representative may require use of arbitration under Section 13 to determine *how* or by what integration scheme the lists shall actually be combined. Under this interpretation of the TWA Agreement the carrier obviously would prevent integration of seniority lists and accordingly the condition precedent for the application of Sections 3 and 13 would be absent. Thus, acceptance of the Company's full position in the present case could indeed make meaningful LPP protection "illusory," as ALPA has stated.

words "insofar as the merger affects the seniority rights of the carriers' employees." The meaning of the term "merger" in the just-quoted phrase is specified by the Allegheny-Mohawk Section 2(a) definition of the term:

> "Section 2(a). The term 'merger' as used herein means joint action by the two carriers whereby they unify, consolidate, merge, or pool in whole or in part their separate airline facilities or any of the operations or services previously performed by them through such separate facilities."

Significantly, the foregoing Section 2(a) definition of the term "merger" is expressly made applicable wherever the term is "used herein." It is certain that the just-quoted word "herein" refers to the Civil Aeronautics Board document containing LPP's promulgated by the Board for the Allegheny-Mowawk merger ("and applied by the Board in later cases with virtually no changes"[36]). Thus, the Section 2(a) definition is inherently and necessarily a part of each and every Allegheny-Mohawk provision in which the term "merger" is used, and this of course applies to use of the term "merger" in Section 3. Moreover, being an inherent and necessary part of Allegheny-Mohawk Section 3, the Section 2(a) definition must be deemed applicable to Section 3 whenever other parties adopt Section 3 for their own use unless they make it abundantly clear that their intent is otherwise. Eastern and ALPA did adopt Allegheny-Mohawk Section 3 for use in the February 23 Agreement. But by no means did Eastern make it abundantly

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[36] The latter quotation is from the "Remanded Texas Air-Eastern Acquisition Case" decision of the Department of Transportation, as previously quoted hereinabove.

clear, either when Eastern drafted its Proposal No. 7 or when Gibson read the proposal to the ALPA Negotiating Committee, that the term "merger" as used in Section 3 would mean anything different from the meaning given it by the Civil Aeronautics Board in the Allegheny-Mohawk LPP's. And it is even more certain that the ALPA Negotiating Committee was given no hint, when Eastern Proposal No. 7 was read to them, that it was intended to leave pilot LPP protection up to the future choice and discretion of the Company.[37]

Had the ALPA Negotiating Committee received at least a hint of any such Company intent, the Committee might well have then taken to the MEC a much different position on Eastern Proposal No. 7 than the apparently neutral position which was actually carried to the MEC. There is no thought here of charging the Company with intent to deceive. But it is entirely fitting to point out that if the Company intended by its Proposal No. 7, the highly uncertain protection produced by the Company's present position regarding the triggering of Sections 3 and 13, then the Company was obligated to inform the pilots of that intent. And this is so even though no question was asked about the reference to LPP's when Proposal No. 7

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[37] See Tr 88-89 where ALPA Negotiating Committee Chairman Tully described the atmosphere prevailing when Eastern Negotiating Committee Chairman Gibson read Eastern Proposal No. 7 to the ALPA Committee, and where Tully also testified as follows: "He [Gibson] gave us the proposal * * *. He ran through it very briefly, and said, I am paraphrasing once again, he said, we have to leave. We have to go now." Apparently Gibson said little if anything about the Company's LPP proposal. See Tr 108-109 (Tully); 855-857, 930 (Gibson). Surely, caveat emptor is not acceptable as the order of the day notwithstanding the fact that pressure on the ALPA Negotiating Committee was coming not only from the Company but also from the pilot group.

was read to the ALPA Negotiating Committee on February 23, 1986.[35]

Under all of the evidence of record in this case and in light of all of the considerations discussed above in this Opinion, it is concluded that the most reasonable construction of the reference to LPP's in the February 23 Agreement is that it incorporates into the latter Agreement Sections 2(a), 3, and 13 of the Allegheny-Mohawk LPP's.

## AWARD

The L. D. Schulte grievance (ALPA Case No. 1-86) is hereby resolved as follows: As concerns labor protective provisions, the February 23, 1986, Agreement between ALPA and Eastern Air Lines includes Sections 2(a), 3, and 13 of the Allegheny-Mohawk LPP's. It does not include any other provision which is included in the TWA Agreement,

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[35] At various points in the course of reading the proposal to the ALPA Negotiating Committee Gibson offered opportunity for questions, but apparently none was asked. See Tr 266-268 (Tully on cross-examination). But as stated above, an obligation to volunteer information existed as concerns LPP's. On the other hand, the recognition of an obligation to volunteer information does not apply equally to the Company's intent not to provide pecuniary allowances such as those provided by the Allegheny-Mohawk LPP's, since no ALPA spokesperson had stressed that type of protection to the Company nearly as emphatically as the Section 3 and Section 13 protection was stressed. And here we should note again the Company's argument that "Considering Eastern's dire financial condition on February 23, 1986, and the general concessionary nature of Eastern's contract proposals (including a 20% pay reduction for pilots) it is inconceivable that Eastern would propose, or ALPA believed that Eastern was proposing the high-cost [pecuniary allowances provided by the] Allegheny-Mohawk LPP's." Company Brief, p. 31. As stated earlier in this Opinion, this Company argument has at least some merit – it should not be totally discounted or rejected.

nor does it include any other part of the Allegheny-Mohawk LPP's except that the question whether it includes Allegheny-Mohawk Section 2(d) need not be answered and is not answered in the present case.

By order of the Eastern Air Lines Pilots System Board of Adjustment September 22, 1989

/s/ Frank Elkouri
Frank Elkouri,
Neutral Referee

/s/ J.P. Distel
J.P. Distel,
Association Member

/s/ George T. Jehn
George T. Jehn,
Association Member

/s/ SEE ATTACHED OPINION
William R. Tegtman,
Company Member

/s/ SEE ATTACHED OPINION
Noel R. Honohan,
Company Member

Dissenting: /s/ William R. Tegtman
/s/ Noel R. Honohan

## SUPPLEMENTAL OPINION

## ALPA CASE NO. 1-86

We respectfully dissent from that part of the Board's award that finds Eastern and ALPA agreed to incorporate Section 2(a) of the so-called Allegheny-Mohawk Labor Protective Provisions ("LPP's") into the portion of the Agreement which concerns LPP's.

The Agreement states in relevant part: "LPP's & Takeover Similar to TWA." It was the System Board's task to determine the "contours" of this disputed provision. In doing so, the Board examined the contract language and the parties' testimony regarding their mutual understanding of certain terms. As part of its analysis, the Board examined the TWA/ALPA Labor Protection Agreement, an agreement that was in part drawn from the labor protections originally created by the CAB in its Allegheny-Mohawk decision.

An examination of the record leads to the conclusion that the parties solely intended to incorporate into their Agreement the LPP's which were included in the TWA/ALPA Agreement. After examining the TWA/ALA Agreement, it was easy to conclude that Eastern and ALPA had intended to include in their Agreement Sections 3 and 13 of the Allegheny-Mohawk LPP's, since these sections are incorporated by direct reference in the TWA Agreement. Thus, the Board rejected ALPA's contention that the parties' Agreement includes the full protections found in Sections 1-13 of the Allegheny-Mohawk LPP's, and found that the parties' Agreement includes the substantive merger protection of Sections 3 and 13 of the Allegheny-Mohawk LPP's as it appeared in the TWA Agreement. We concur in this holding.

The question of when these protections are triggered presented a different problem and it is from that portion of the Board's award that we dissent. The ALPA/TWA agreement could not be clearer about the event that triggers the application of Sections 3 and 13 of the Allegheny-Mohawk LPP's. The ALPA/TWA agreement expressly provides that the triggering event is the actual merger of the pilot seniority lists of two separate airlines under the common control of a holding company. After being unable to convince this Board that the parties had agreed to "full Allegheny-Mohawk LPPs," ALPA changed its argument and requested that this Board ignore the language in the ALPA/TWA Agreement, and provide the Eastern pilots "meaningful" triggers for the LPP's in the Agreement. ALPA's actions before this board clearly convince us that well after the Agreement was reached and Eastern was acquired by Texas Air, ALPA studied the TWA "triggers" it had agreed upon and decided that they did not offer ALPA the "protection" it currently believes it needs.

Thus, ALPA asked the Board to "define" the events which trigger the application of the LPP provision in the Agreement far differently than they were defined in the TWA LPP agreement. In fact, ALPA asked the Board to find that the parties agreed to "meaningful protection" and further argued that it was this Board's duty to fashion those protections. In sum ALPA asked the Board to create triggers that were never incorporated in the TWA agreement or that were never discussed by the parties. And, the majority of this Board has now done so by ignoring both the TWA agreement and the evidence in the record concerning the contours of the parties' agreement. No matter how sympathetic the Board may

be to the plight of a party it may not, in the guise of contract interpretation, change the contractually agreed upon obligations of the parties. Here that is exactly what happened and it is from that portion of the Board's award that we dissent.

/s/ William R. Tegtman
William R. Tegtman,
Company Member

/s/ Noel R. Honohan
Noel R. Honohan,
Company Member

## APPENDIX I

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 00-3505

IN RE CONTINENTAL AIRLINES, INC.,
Debtor,

EASTERN PILOTS MERGER COMMITTEE,
Appellant,

v.

CONTINENTAL AIRLINES, INC.,
Appellee,

PATRICIA A. STAIANO, Trustee.

**Present:** BECKER, *Chief Judge,* SLOVITER, MANSMANN,* SCIRICA, ALITO, ROTH, McKEE, RENDELL, BARRY, AMBRO, FUENTES, and ALDISERT,** *Circuit Judges.* and FULLAM,** *District Judge*

**SUR PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING *EN BANC***

The petition for rehearing en banc filed by Appellant having been submitted to the judges who participated in the decision of this Court, and to all the other available circuit judges in active service, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the

* Honorable Carol Los Mansmann died on March 9, 2002

** As to panel rehearing only.

court *en banc,* the petition for rehearing en banc is DENIED.

BY THE COURT:

/s/ Maryann Trump Barry
Circuit Judge

DATED: APR 2 2002

gbl/cc: JLP
CMT
JFH
CCF

## APPENDIX J

## 11 U.S.C. § 365.

§ 365. Executory contracts and unexpired leases

(a) Except as provided in sections 765 and 766 of this title and in subsections (b), (c), and (d) of this section, the trustee, subject to the court's approval, may assume or reject any executory contract or unexpired lease of the debtor.

(b)(1) If there has been a default in an executory contract or unexpired lease of the debtor, the trustee may not assume such contract or lease unless, at the time of assumption of such contract or lease, the trustee –

(A) cures, or provides adequate assurance that the trustee will promptly cure, such default;

(B) compensates, or provides adequate assurance that the trustee will promptly compensate, a party other than the debtor to such contract or lease, for any actual pecuniary loss to such party resulting from such default; and

(C) provides adequate assurance of future performance under such contract or lease.

(2) Paragraph (1) of this subsection does not apply to a default that is a breach of a provision relating to –

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title;

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement; or

(D) the satisfaction of any penalty rate or provision relating to a default arising from any failure by the debtor to perform nonmonetary obligations under the executory contract or unexpired lease.

(3) For the purposes of paragraph (1) of this subsection and paragraph (2)(B) of subsection (f), adequate assurance of future performance of a lease of real property in a shopping center includes adequate assurance –

(A) of the source of rent and other consideration due under such lease, and in the case of an assignment, that the financial condition and operating performance of the proposed assignee and its guarantors, if any, shall be similar to the financial condition and operating performance of the debtor and its guarantors, if any, as of the time the debtor became the lessee under the lease;

(B) that any percentage rent due under such lease will not decline substantially;

(C) that assumption or assignment of such lease is subject to all the provisions thereof, including (but not limited to) provisions such as a radius, location, use, or exclusivity provision, and will not breach any such provision contained in any other lease, financing agreement, or master agreement relating to such shopping center; and

(D) that assumption or assignment of such lease will not disrupt any tenant mix or balance in such shopping center.

(4) Notwithstanding any other provision of this section, if there has been a default in an unexpired lease of the debtor, other than a default of a kind specified in paragraph (2) of this subsection, the trustee may not require a lessor to provide services or supplies incidental

to such lease before assumption of such lease unless the lessor is compensated under the terms of such lease for any services and supplies provided under such lease before assumption of such lease.

(c) The trustee may not assume or assign any executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if –

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment; or

(2) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor;

(3) such lease is of nonresidential real property and has been terminated under applicable nonbankruptcy law prior to the order for relief; or

(4) such lease is of nonresidential real property under which the debtor is the lessee of an aircraft terminal or aircraft gate at an airport at which the debtor is the lessee under one or more additional nonresidential leases of an aircraft terminal or aircraft gate and the trustee, in connection with such assumption or assignment, does not assume all such leases or does not assume and assign all of such leases to the same person, except that the trustee

may assume or assign less than all of such leases with the airport operator's written consent.

(d)(1) In a case under chapter 7 of this title, if the trustee does not assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor within 60 days after the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such contract or lease is deemed rejected.

(2) In a case under chapter 9, 11, 12, or 13 of this title, the trustee may assume or reject an executory contract or unexpired lease of residential real property or of personal property of the debtor at any time before the confirmation of a plan but the court, on the request of any party to such contract or lease, may order the trustee to determine within a specified period of time whether to assume or reject such contract or lease.

(3) The trustee shall timely perform all the obligations of the debtor, except those specified in section 365(b)(2), arising from and after the order for relief under any unexpired lease of nonresidential real property, until such lease is assumed or rejected, notwithstanding section 503(b)(1) of this title. The court may extend, for cause, the time for performance of any such obligation that arises within 60 days after the date of the order for relief, but the time for performance shall not be extended beyond such 60-day period. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f) of this section. Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(4) Notwithstanding paragraphs (1) and (2), in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is the lessee within 60 days after the date of the order for relief, or within such additional time as the court, for cause, within such 60-day period, fixes, then such lease is deemed rejected, and the trustee shall immediately surrender such nonresidential real property to the lessor.

(5) Notwithstanding paragraphs (1) and (4) of this subsection, in a case under any chapter of this title, if the trustee does not assume or reject an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate before the occurrence of a termination event, then (unless the court orders the trustee to assume such unexpired leases within 5 days after the termination event), at the option of the airport operator, such lease is deemed rejected 5 days after the occurrence of a termination event and the trustee shall immediately surrender possession of the premises to the airport operator; except that the lease shall not be deemed to be rejected unless the airport operator first waives the right to damages related to the rejection. In the event that the lease is deemed to be rejected under this paragraph, the airport operator shall provide the affected air carrier adequate opportunity after the surrender of the premises to remove the fixtures and equipment installed by the affected air carrier.

(6) For the purpose of paragraph (5) of this subsection and paragraph (f)(1) of this section, the occurrence of a termination event means, with respect to a debtor which is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate –

(A) the entry under section 301 or 302 of this title of an order for relief under chapter 7 of this title;

(B) the conversion of a case under any chapter of this title to a case under chapter 7 of this title; or

(C) the granting of relief from the stay provided under section 362(a) of this title with respect to aircraft, aircraft engines, propellers, appliances, or spare parts, as defined in section 40102(a) of title 49, except for property of the debtor found by the court not to be necessary to an effective reorganization.

(d)(7) Any order entered by the court pursuant to paragraph (4) extending the period within which the trustee of an affected air carrier must assume or reject an unexpired lease of nonresidential real property shall be without prejudice to –

(A) the right of the trustee to seek further extensions within such additional time period granted by the court pursuant to paragraph (4); and

(B) the right of any lessor or any other party in interest to request, at any time, a shortening or termination of the period within which the trustee must assume or reject an unexpired lease of nonresidential real property.

(8) The burden of proof for establishing cause for an extension by an affected air carrier under paragraph (4) or the maintenance of a previously granted extension under paragraph (7)(A) and (B) shall at all times remain with the trustee.

(9) For purposes of determining cause under paragraph (7) with respect to an unexpired lease of nonresidential real property between the debtor that is an affected air carrier and an airport operator under which such debtor is

the lessee of an airport terminal or an airport gate, the court shall consider, among other relevant factors, whether substantial harm will result to the airport operator or airline passengers as a result of the extension or the maintenance of a previously granted extension. In making the determination of substantial harm, the court shall consider, among other relevant factors, the level of actual use of the terminals or gates which are the subject of the lease, the public interest in actual use of such terminals or gates, the existence of competing demands for the use of such terminals or gates, the effect of the court's extension or termination of the period of time to assume or reject the lease on such debtor's ability to successfully reorganize under chapter 11 of this title, and whether the trustee of the affected air carrier is capable of continuing to comply with its obligations under section 365(d)(3) of this title.

(10) The trustee shall timely perform all of the obligations of the debtor, except those specified in section 365(b)(2), first arising from or after 60 days after the order for relief in a case under chapter 11 of this title under an unexpired lease of personal property (other than personal property leased to an individual primarily for personal, family, or household purposes), until such lease is assumed or rejected notwithstanding section 503(b)(1) of this title, unless the court, after notice and a hearing and based on the equities of the case, orders otherwise with respect to the obligations or timely performance thereof. This subsection shall not be deemed to affect the trustee's obligations under the provisions of subsection (b) or (f). Acceptance of any such performance does not constitute waiver or relinquishment of the lessor's rights under such lease or under this title.

(e)(1) Notwithstanding a provision in an executory contract or unexpired lease, or in applicable law, an executory contract or unexpired lease of the debtor may not be terminated or modified, and any right or obligation under such contract or lease may not be terminated or modified, at any time after the commencement of the case solely because of a provision in such contract or lease that is conditioned on –

(A) the insolvency or financial condition of the debtor at any time before the closing of the case;

(B) the commencement of a case under this title; or

(C) the appointment of or taking possession by a trustee in a case under this title or a custodian before such commencement.

(2) Paragraph (1) of this subsection does not apply to an executory contract or unexpired lease of the debtor, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if –

(A)(i) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to the trustee or to an assignee of such contract or lease, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(ii) such party does not consent to such assumption or assignment; or

(B) such contract is a contract to make a loan, or extend other debt financing or financial accommodations, to or for the benefit of the debtor, or to issue a security of the debtor.

(f)(1) Except as provided in subsection (c) of this section, notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law, that prohibits, restricts, or conditions the assignment of such contract or lease, the trustee may assign such contract or lease under paragraph (2) of this subsection; except that the trustee may not assign an unexpired lease of nonresidential real property under which the debtor is an affected air carrier that is the lessee of an aircraft terminal or aircraft gate if there has occurred a termination event.

(2) The trustee may assign an executory contract or unexpired lease of the debtor only if –

(A) the trustee assumes such contract or lease in accordance with the provisions of this section; and

(B) adequate assurance of future performance by the assignee of such contract or lease is provided, whether or not there has been a default in such contract or lease.

(3) Notwithstanding a provision in an executory contract or unexpired lease of the debtor, or in applicable law that terminates or modifies, or permits a party other than the debtor to terminate or modify, such contract or lease or a right or obligation under such contract or lease on account of an assignment of such contract or lease, such contract, lease, right, or obligation may not be terminated or modified under such provision because of the assumption or assignment of such contract or lease by the trustee.

(g) Except as provided in subsections (h)(2) and (i)(2) of this section, the rejection of an executory contract or unexpired lease of the debtor constitutes a breach of such contract or lease –

(1) if such contract or lease has not been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title, immediately before the date of the filing of the petition; or

(2) if such contract or lease has been assumed under this section or under a plan confirmed under chapter 9, 11, 12, or 13 of this title –

(A) if before such rejection the case has not been converted under section 1112, 1208, or 1307 of this title, at the time of such rejection; or

(B) if before such rejection the case has been converted under section 1112, 1208, or 1307 of this title –

(i) immediately before the date of such conversion, if such contract or lease was assumed before such conversion; or

(ii) at the time of such rejection, if such contract or lease was assumed after such conversion.

(h)(1)(A) If the trustee rejects an unexpired lease of real property under which the debtor is the lessor and –

(i) if the rejection by the trustee amounts to such a breach as would entitle the lessee to treat such lease as terminated by virtue of its terms, applicable nonbankruptcy law, or any agreement made by the lessee, then the lessee under such lease may treat such lease as terminated by the rejection; or

(ii) if the term of such lease has commenced, the lessee may retain its rights under such lease (including rights such as those relating to the amount and timing of payment of rent

and other amounts payable by the lessee and any right of use, possession, quiet enjoyment, subletting, assignment, or hypothecation) that are in or appurtenant to the real property for the balance of the term of such lease and for any renewal or extension of such rights to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the lessee retains its rights under subparagraph (A)(ii), the lessee may offset against the rent reserved under such lease for the balance of the term after the date of the rejection of such lease and for the term of any renewal or extension of such lease, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such lease, but the lessee shall not have any other right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(C) The rejection of a lease of real property in a shopping center with respect to which the lessee elects to retain its rights under subparagraph (A)(ii) does not affect the enforceability under applicable nonbankruptcy law of any provision in the lease pertaining to radius, location, use, exclusivity, or tenant mix or balance.

(D) In this paragraph, "lessee" includes any successor, assign, or mortgagee permitted under the terms of such lease.

(2)(A) If the trustee rejects a timeshare interest under a timeshare plan under which the debtor is the timeshare interest seller and –

(i) if the rejection amounts to such a breach as would entitle the timeshare interest purchaser to treat the timeshare plan as terminated under its terms, applicable nonbankruptcy law, or any agreement made by timeshare interest purchaser, the timeshare interest purchaser under the timeshare plan may treat the timeshare plan as terminated by such rejection; or

(ii) if the term of such timeshare interest has commenced, then the timeshare interest purchaser may retain its rights in such timeshare interest for the balance of such term and for any term of renewal or extension of such timeshare interest to the extent that such rights are enforceable under applicable nonbankruptcy law.

(B) If the timeshare interest purchaser retains its rights under subparagraph (A), such timeshare interest purchaser may offset against the moneys due for such timeshare interest for the balance of the term after the date of the rejection of such timeshare interest, and the term of any renewal or extension of such timeshare interest, the value of any damage caused by the nonperformance after the date of such rejection, of any obligation of the debtor under such timeshare plan, but the timeshare interest purchaser shall not have any right against the estate or the debtor on account of any damage occurring after such date caused by such nonperformance.

(i)(1) If the trustee rejects an executory contract of the debtor for the sale of real property or for the sale of a timeshare interest under a timeshare plan, under which the purchaser is in possession, such purchaser may treat such contract as terminated, or, in the alternative, may remain

in possession of such real property or timeshare interest.

(2) If such purchaser remains in possession –

(A) such purchaser shall continue to make all payments due under such contract, but may, offset against such payments any damages occurring after the date of the rejection of such contract caused by the nonperformance of any obligation of the debtor after such date, but such purchaser does not have any rights against the estate on account of any damages arising after such date from such rejection, other than such offset; and

(B) the trustee shall deliver title to such purchaser in accordance with the provisions of such contract, but is relieved of all other obligations to perform under such contract.

(j) A purchaser that treats an executory contract as terminated under subsection (i) of this section, or a party whose executory contract to purchase real property from the debtor is rejected and under which such party is not in possession, has a lien on the interest of the debtor in such property for the recovery of any portion of the purchase price that such purchaser or party has paid.

(k) Assignment by the trustee to an entity of a contract or lease assumed under this section relieves the trustee and the estate from any liability for any breach of such contract or lease occurring after such assignment.

(l) If an unexpired lease under which the debtor is the lessee is assigned pursuant to this section, the lessor of the property may require a deposit or other security for the performance of the debtor's obligations under the lease

substantially the same as would have been required by the landlord upon the initial leasing to a similar tenant.

(m) For purposes of this section 365 and sections 541(b)(2) and 362(b)(10), leases of real property shall include any rental agreement to use real property.

(n)(1) If the trustee rejects an executory contract under which the debtor is a licensor of a right to intellectual property, the licensee under such contract may elect –

(A) to treat such contract as terminated by such rejection if such rejection by the trustee amounts to such a breach as would entitle the licensee to treat such contract as terminated by virtue of its own terms, applicable nonbankruptcy law, or an agreement made by the licensee with another entity; or

(B) to retain its rights (including a right to enforce any exclusivity provision of such contract, but excluding any other right under applicable nonbankruptcy law to specific performance of such contract) under such contract and under any agreement supplementary to such contract, to such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law), as such rights existed immediately before the case commenced, for –

(i) the duration of such contract; and

(ii) any period for which such contract may be extended by the licensee as of right under applicable nonbankruptcy law.

(2) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, under such contract –

(A) the trustee shall allow the licensee to exercise such rights;

(B) the licensee shall make all royalty payments due under such contract for the duration of such contract and for any period described in paragraph (1)(B) of this subsection for which the licensee extends such contract; and

(C) the licensee shall be deemed to waive –

(i) any right of setoff it may have with respect to such contract under this title or applicable nonbankruptcy law; and

(ii) any claim allowable under section 503(b) of this title arising from the performance of such contract.

(3) If the licensee elects to retain its rights, as described in paragraph (1)(B) of this subsection, then on the written request of the licensee the trustee shall –

(A) to the extent provided in such contract, or any agreement supplementary to such contract, provide to the licensee any intellectual property (including such embodiment) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment) including any right to obtain such intellectual property (or such embodiment) from another entity.

(4) Unless and until the trustee rejects such contract, on the written request of the licensee the trustee shall –

(A) to the extent provided in such contract or any agreement supplementary to such contract –

(i) perform such contract; or

(ii) provide to the licensee such intellectual property (including any embodiment of such intellectual property to the extent protected by applicable nonbankruptcy law) held by the trustee; and

(B) not interfere with the rights of the licensee as provided in such contract, or any agreement supplementary to such contract, to such intellectual property (including such embodiment), including any right to obtain such intellectual property (or such embodiment) from another entity.

(o) In a case under chapter 11 of this title, the trustee shall be deemed to have assumed (consistent with the debtor's other obligations under section 507), and shall immediately cure any deficit under, any commitment by the debtor to a Federal depository institutions regulatory agency (or predecessor to such agency) to maintain the capital of an insured depository institution, and any claim for a subsequent breach of the obligations thereunder shall be entitled to priority under section 507. This subsection shall not extend any commitment that would otherwise be terminated by any act of such an agency.

[(p) Repealed. Pub.L. 103-394, Title V, § 501(d)(10)(E), Oct. 22, 1994, 108 Stat. 4145]

## APPENDIX K

## 11 U.S.C. § 1113

§ 1113. Rejection of collective bargaining agreements

(a) The debtor in possession, or the trustee if one has been appointed under the provisions of this chapter, other than a trustee in a case covered by subchapter IV of this chapter and by title I of the Railway Labor Act, may assume or reject a collective bargaining agreement only in accordance with the provisions of this section.

(b)(1) Subsequent to filing a petition and prior to filing an application seeking rejection of a collective bargaining agreement, the debtor in possession or trustee (hereinafter in this section "trustee" shall include a debtor in possession), shall –

> (A) make a proposal to the authorized representative of the employees covered by such agreement, based on the most complete and reliable information available at the time of such proposal, which provides for those necessary modifications in the employees benefits and protections that are necessary to permit the reorganization of the debtor and assures that all creditors, the debtor and all of the affected parties are treated fairly and equitably; and
>
> (B) provide, subject to subsection (d)(3), the representative of the employees with such relevant information as is necessary to evaluate the proposal.

(2) During the period beginning on the date of the making of a proposal provided for in paragraph (1) and ending on the date of the hearing provided for in subsection (d)(1), the trustee shall meet, at reasonable times, with the authorized representative to confer in good faith

in attempting to reach mutually satisfactory modifications of such agreement.

(c) The court shall approve an application for rejection of a collective bargaining agreement only if the court finds that –

(1) the trustee has, prior to the hearing, made a proposal that fulfills the requirements of subsection (b)(1);

(2) the authorized representative of the employees has refused to accept such proposal without good cause; and

(3) the balance of the equities clearly favors rejection of such agreement.

(d)(1) Upon the filing of an application for rejection the court shall schedule a hearing to be held not later than fourteen days after the date of the filing of such application. All interested parties may appear and be heard at such hearing. Adequate notice shall be provided to such parties at least ten days before the date of such hearing. The court may extend the time for the commencement of such hearing for a period not exceeding seven days where the circumstances of the case, and the interests of justice require such extension, or for additional periods of time to which the trustee and representative agree.

(2) The court shall rule on such application for rejection within thirty days after the date of the commencement of the hearing. In the interests of justice, the court may extend such time for ruling for such additional period as the trustee and the employees' representative may agree to. If the court does not rule on such application within thirty days after the date of the commencement of the hearing, or within such additional time as the trustee

and the employees' representative may agree to, the trustee may terminate or alter any provisions of the collective bargaining agreement pending the ruling of the court on such application.

(3) The court may enter such protective orders, consistent with the need of the authorized representative of the employee to evaluate the trustee's proposal and the application for rejection, as may be necessary to prevent disclosure of information provided to such representative where such disclosure could compromise the position of the debtor with respect to its competitors in the industry in which it is engaged.

(e) If during a period when the collective bargaining agreement continues in effect, and if essential to the continuation of the debtor's business, or in order to avoid irreparable damage to the estate, the court, after notice and a hearing, may authorize the trustee to implement interim changes in the terms, conditions, wages, benefits, or work rules provided by a collective bargaining agreement. Any hearing under this paragraph shall be scheduled in accordance with the needs of the trustee. The implementation of such interim changes shall not render the application for rejection moot.

(f) No provision of this title shall be construed to permit a trustee to unilaterally terminate or alter any provisions of a collective bargaining agreement prior to compliance with the provisions of this section.